A marketplace for legal mobilisation? A study of the use of crowdfunding in judicial review claims

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Abstract

The use of crowdfunding to bring judicial review claims, especially 'public interest litigation', has grown rapidly in recent years in the United Kingdom, as has its visibility and notoriety. This presents the scholarly and policy community with important questions concerning, not least, how crowdfunding works in litigation and what to do about its increasing adoption. Peculiarly, though, there has been limited dedicated and rigorous study, particularly empirical work understanding its operation in practice. This thesis begins to address this sizeable lacuna, presenting a mixed-methods empirical study of the use of crowdfunding, informed primarily by the legal mobilisation framework.

It makes a number of core contributions to the developing debate. First, it argues that, while commentators commonly frame crowdfunding as a disruptive force, crowdfunding has become reasonably routinised in public law litigation. Many crowdfunded claims are small-scale and localised, as demonstrated by quantitative analysis, while the resource appears fairly well-understood across parties to public interest litigation, as a tool working alongside other mechanisms like costs-capping. Second, it proposes that crowdfunding offers claimant groups a number of resource benefits, not confined to its monetary role – crowdfunding may also represent a non-material, cultural and rhetorical resource for groups. Third, it highlights that using crowdfunding to fund litigation is not as easy and spurious as some portray – fundraising presents resource burdens, while claimants face a power imbalance when mobilising law vis-à-vis government and judicial system designers.

The thesis is structured across three overarching parts. Part One outlines the relevant scholarship and the study's methodology, and provides a systematic quantitative picture of the crowdfunding landscape. Part Two positions crowdfunding as a multifaceted resource for public interest litigants, offering material and non-material resource opportunities for effective mobilisation. Part Three pivots to emphasise the challenges litigants encounter when using crowdfunding to litigate.

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Declaration

I declare that this thesis is a presentation of original work and I am the sole author. This work has not previously been presented for a degree or other qualification at this University or elsewhere. All sources are acknowledged as references.

The research in Chapter Two has been used in the following publications:

> Guy S, 'Mobilising the market: an empirical analysis of crowdfunding for judicial review litigation' (2023) 86(2) MLR 331.
>
> Guy S, 'Eroding Public Law's Exclusions? Charting the Landscape of Crowdfunding in Judicial Review' (UK Constitutional Law Blog) <https://ukconstitutionallaw.org/2022/11/08/sam-guy-eroding-public-laws-exclusions-charting-the-landscape-of-crowdfunding-in-judicial-review/>.

The following publications originated from research completed prior to undertaking the PhD, and so are referred to in the thesis:

> Guy S, 'Access to justice on the market: An empirical case study on the dynamics of crowdfunding judicial reviews' [2021] PL 678.
>
> Guy S, 'Judicial review and Covid-19: reflections on the role of crowdfunding' (Essex Constitutional and Administrative Justice Institute, 5 June 2020) <https://essexcaji.org/2020/06/05/judicial-review-and-covid-19-reflections-on-the-role-of-crowdfunding/>.

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> Public Law Conference, University College Dublin, 8 July 2022
>
> Socio-legal Studies Association Annual Conference, University of York, 7 April 2022
>
> Society of Legal Scholars Conference, Durham University, 3 September 2021

I confirm that this thesis is under 100,000 words, inclusive of references and excluding the bibliography, figures, tables, and appendices.

Part I

Chapter One: Introduction

The 'why' of the thesis and the tale of crowdfunding so far

The growth of crowdfunding for public law litigation in recent years, both in quantitative scale and in the attention afforded it across column inches and on social media, will not have escaped the attention of those interested in law and policy. The tone of coverage effectively reveals two core positions – on one side, crowdfunding represents a rare hope for access to judicial review in a costs landscape inhospitable to claimants; on the other, it creates a risk of frivolous litigation which, absent regulation mandating transparent communication, misleads donors into giving money towards hopeless actions wasting court time.[1] Of course, these two positions are not incompatible, and proponents of crowdfunding may nonetheless support regulatory intervention.[2] There appears, though, a divide in the relative emphasis afforded to each position between more positive and more sceptical commentators. In particular, an entire ecosystem of commentary is emerging around one core repeat player crowdfunding litigant: the Good Law Project, and its founder, Jolyon Maugham KC. This includes relatively deferential commentary, as well as a veritable cottage industry of highly critical pieces.[3] Indeed, Maugham, the flawed protagonist of the tale of crowdfunding to date, has recently contributed his own book recounting his experiences with the Good Law Project,[4] which has predictably only furthered

[1] See for instance Melanie Newman, 'Strength in numbers' *Law Society Gazette* (London, 23 July 2018) <https://www.lawgazette.co.uk/features/strength-in-numbers/5066950.article>; Alexander Horne, 'Why crowdfunding legal cases is a recipe for disaster' *Prospect* (London, 20 April 2022) <https://www.prospectmagazine.co.uk/politics/why-crowdfunding-legal-cases-is-a-recipe-for-disaster>. All webpages in this chapter last accessed 11 September 2023 unless otherwise stated.

[2] Jolyon Maugham KC, 'Is crowdfunding the next mis-selling scandal?' *Law Society Gazette* (London, 20 July 2020) <https://www.lawgazette.co.uk/practice-points/is-crowdfunding-the-next-mis-selling-scandal/5105038.article>.

[3] For the former, see for instance Ruby Lott-Lavigna, 'It Will Be Difficult, but We Have to Try': The Lawyers Fighting for Trans Rights in the UK' *Vice News* (London, 15 December 2020) <https://www.vice.com/en/article/qjp3ab/it-will-be-difficult-but-we-have-to-try-the-lawyers-fighting-for-trans-rights-in-the-uk>. For examples of the latter, which are hardly difficult to find, see Steven Barratt, 'Why the Good Law Project lost – again' The Spectator (London, 1 December 2022) <https://www.spectator.co.uk/article/why-the-good-law-project-lost-again/>; Tony Dowson, 'The miseries of Maugham' *The Critic* (London, 9 December 2022) <https://thecritic.co.uk/the-miseries-of-maugham/>.

[4] Jolyon Maugham KC, *Bringing Down Goliath: How Good Law Can Topple the Powerful* (WH Allen 2023).

the criticism directed his way.[5] One would be forgiven, upon surveying these popular debates, for thinking that crowdfunding was used only by a small number of political campaign groups raising eye-watering amounts of money.

My own position on the place of crowdfunding will become clear through the thesis, but it can be stated concisely here. While some of the concerns around the conduct of crowdfunding campaigns are fair and deserve attention, much of the popular debate around crowdfunding represents something of a red herring. Look beyond the high-profile claims and one finds a hive of activity which scarcely resembles the controversial outliers. Most claimants will be less concerned with, say, what to do with unused funds if a case raises too much money, than whether it will raise enough to proceed beyond a pre-action letter or satisfy a judge to make a costs-capping order.

We might hope that, even if broader perceptions of crowdfunding focus on a small number of unrepresentative cases, researchers have filled the lacuna with empirical study. Yet, despite the considerable public attention afforded to it, academic research on crowdfunding in judicial review has proven surprisingly scarce. Amid a broader scholarship analysing crowdfunding in the financial sector,[6] and in civic and political campaigns,[7] a relatively small literature has developed worldwide on the use of crowdfunding in litigation,[8] including in

[5] Yuan Yi Zhu, 'Bringing Down Goliath by Jolyon Maugham review – the pompous bloviating of a Twitter KC' *The Times* (London, 22 April 2023) <https://www.thetimes.co.uk/article/bringing-down-goliath-by-jolyon-maugham-review-2x2df8qcx>; Gareth Roberts, 'Jolyon Maugham's opening sentence might be the worst of all time' *The Spectator* (London, 25 April 2023) <https://www.spectator.co.uk/article/jolyon-maughams-opening-sentence-might-be-the-worst-of-all-time/>.

[6] Paul Langley and Andrew Leyshon, 'Capitalizing on the crowd: The monetary and financial ecologies of crowdfunding' (2017) 49(5) Environment and Planning A 1019; Rob Gleasure and Lorraine Morgan, 'The pastoral crowd: Exploring self-hosted crowdfunding using activity theory and social capital' (2018) 28(3) Info Systems J. 489; John Armour and Luca Enriques, 'The Promise and Perils of Crowdfunding: Between Corporate Finance and Consumer Contracts' (2018) 81(1) MLR 51.

[7] Rodrigo Davies, 'Three provocations for civic crowdfunding' (2015) 18(3) Information, Communication & Society 342; Riri Kusumarani and Hangjung Zo, 'Why people participate in online political crowdfunding: A civic voluntarism perspective' (2019) 41 Telematics and Informatics 168; Natalia Khoma, 'Technologies of Political (Socio-Political) Crowdsourcing and Crowdfunding: World Experience and Steps towards Implementation In Ukraine' (2015) 1(8) Torun International Studies 49.

[8] See Michael Elliott, 'Trial by Social-Media: The Rise of Litigation Crowdfunding' (2016) 84 U CIN L REV 529; Manuel A Gomez, 'Crowdfunded Justice: On the Potential Benefits and Challenges of Crowdfunding as a

'public interest' claims which have some resonance with the public law context.[9] Domestically, there has been little dedicated research on crowdfunding in public law –[10] Joe Tomlinson provided an important early survey of the landscape,[11] yet this account is hardly exhaustive, lacking empirical inquiry, and the crowdfunding field has developed considerably since 2019. Meanwhile, what empirical work has been conducted, in England and Wales,[12] and in Scotland,[13] has been exploratory and small-scale. Perhaps the most interesting empirical research has been Raghupathi and others' use of text-mining to explain the causes of crowdfunding success, looking to the psychology of the crowd,[14] and to trace the field's dynamics, such as the types of case advertised and the relationship of the length of case descriptions to the success of crowdfunding.[15] This research uses CrowdJustice, the main litigation crowdfunding site in the UK, and many of the cases sampled are from the UK, alongside the USA, across a range of substantive issues. The data analysis, though, could be more nuanced and rigorous with a closer understanding of the particular contexts of litigation in the UK. Research on crowdfunding in public law litigation, especially judicial review, where much activity occurs, remains frustratingly underexplored, then. Through an empirical mixed-methods study, this thesis sets about changing this state of affairs. Still, the fact an issue is

Litigation Financing Tool' (2015) 49 USF L REV 307; Ronen Perry, 'Crowdfunding Civil Justice' (2018) 59 BC L REV 1357.

[9] Julius Yam, 'Political Crowdfunding of Rights' (2020) 50 HKLJ 395; Evan Hamman, 'Save the Reef: Civic Crowdfunding and Public Interest Environmental Litigation' (2015) 15 QUT L REV 159.

[10] Crowdfunding does arise in discussion in related studies, for instance on Brexit litigation: Christopher McCorkindale and Aileen McHarg, 'Litigating Brexit' in Oran Doyle, Aileen McHarg, and Jo Murkens, *The Brexit Challenge for Ireland and the United Kingdom: Constitutions Under Pressure* (CUP 2021),

[11] Joe Tomlinson, 'Crowdfunding public interest judicial reviews: a risky new resource and the case for a practical ethics' [2019] PL 166; Joe Tomlinson, *Justice in the Digital State* (Policy Press 2019), see chapter 2.

[12] Sam Guy, 'Access to justice on the market: An empirical case study on the dynamics of crowdfunding judicial reviews' [2021] PL 678.

[13] Andrew Tickell, 'The continuation of politics by other means: crowdfunded litigation in Scotland (2015-2021)' (2022) 26(1) Edin.L.R. 100.

[14] Jie Ren, Viju Raghupathi and Wullianallur Raghupathi, 'Exploring the Factors that Determine the Success of Litigation Crowdfunding: Implications for Social Justice' (2021) 169 Technological Forecasting & Social Change 120813.

[15] Viju Raghupathi, Jie Ren and Wullianallur Raghupathi, 'Understanding the nature and dimensions of litigation crowdfunding: A visual analytics approach' (2021) 16(4) PLoS ONE.

under-researched does not necessarily justify a PhD thesis – perhaps it is not worth researching. Why is this research project – its question and design – necessary, and why now?

At this stage, it is worth stating the research question: 'How does crowdfunding affect the experiences of legal mobilisation by social reform actors within the judicial review system?' Influenced by the legal mobilisation literature, which analyses the use of law in campaigns for social change, as discussed below, and by a socio-legal sensibility to research, as discussed in Chapter Three, I employ two sub-questions to structure the research design. In doing so, I address the core research question through both quantitative and qualitative methods: (i) What is the landscape of crowdfunded judicial review claims? (ii) How is crowdfunding used in legal campaigns for social change? In (i), I construct and analyse a database of 413 judicial review claims advertised on CrowdJustice.com, contributing to literature that systematically maps the judicial review field. This quantitative phase presents for the first time an empirical overview of crowdfunding in judicial review, providing a broad picture of the research problem. Core variables from this exercise also provide parameters for a typology-based case selection, used to identify qualitative case studies addressing sub-question (ii). These case studies comprise six judicial review claims brought using crowdfunding, using semi-structured qualitative interviews with relevant actors in each case. They richly illustrate how social actors use crowdfunding to mobilise law in service of diverse causes, providing much-needed understanding of crowdfunding's practical dynamics and actors' experiences and perceptions of the process. This mixed-methods approach, combining positivist and interpretivist features, enables both generalisable claims about the crowdfunding landscape and richer, but necessarily indicative, understandings about social actors' engagement with the resource.

So, why is this design important and appropriate? As outlined, there has been limited empirical research on crowdfunding in judicial review, a fact which sits uncomfortably with the controversy crowdfunding provokes and its importance in facilitating access to judicial review. Crowdfunding raises several new questions, both normative – for instance whether it should be encouraged, how it should be regulated, and what ideologies it advances – and practical – what the dynamics of crowdfunded litigation are, how it operates in relation to the existing architecture of the judicial review process, and how it is experienced by actors in the process. The latter concerns require an empirical basis, which is perhaps partly why much of the focus to date has often defaulted to normative and regulatory issues. Certainly, normative questions, of how we respond to crowdfunding, cannot only be answered by an empirical evidence base, and values come into play. However, a proper understanding and analysis of the

role that crowdfunding in fact plays in public law litigation is crucial if we are to address how to respond to its growth and future.

This endeavour enriches the academic literature on crowdfunding, and the modern landscape of judicial review and 'public interest litigation'. It is also important for policy considerations beyond the academy. The reported frustration with crowdfunded judicial review claims at the centre of government, especially following high-profile litigation like the *Miller* cases,[16] and the ongoing work of the Good Law Project,[17] has further fuelled attempts to restrictively reform aspects of judicial review. The Independent Review of Administrative Law, established by the Ministry of Justice with the stated intention of quelling the use of judicial review to continue 'politics by another means',[18] noted:

> we are concerned about the increasing practice of crowdfunding applications for judicial review … The fact that crowdfunding platforms are unregulated led some respondents to express concern that funders of a particular judicial review might be misled as to the nature, or prospects, of that review.[19]

Crowdfunding, then, is a live issue attracting concern in policy circles, and desires to restrict judicial review are not necessarily finished after the Judicial Review and Courts Act 2022, which implemented the IRAL reforms, proved a relatively damp squib, and following the demise of the Bill of Rights Bill. Crowdfunding, and any regulatory response, must be approached rationally and based on rigorous and systematic analysis, rather than made reactively, in response to hypothetical predictions and a minority of high-profile cases. This project can therefore provide a much-needed rigorous intervention that properly informs conversations around the effects of crowdfunding and its relationship to access to justice, facilitating proportionate and evidence-based policy.

The study approaches crowdfunding using the legal mobilisation framework. It has been increasingly observed that crowdfunding is often used in litigation which forms part of

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[16] *R (Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5; *R (Miller) v The Prime Minister* [2019] UKSC 41; [2020] A.C. 373.

[17] See for instance the comments of Rishi Sunak when running unsuccessfully for Prime Minister against Liz Truss: 'Public Enemy Number One' (Good Law Project, 21 August 2022) <https://goodlawproject.org/public-enemy-number-one/>.

[18] *Independent Review of Administrative Law* (Ministry of Justice) <https://www.gov.uk/government/groups/independent-review-of-administrative-law>.

[19] Ministry of Justice, *The Independent Review of Administrative Law* (Cm 407, 2021), 4.160.

socio-political campaigns – this claim is strengthened by the thesis' quantitative stage, reported in Chapter Two. Given this clear tendency toward litigation as part of social campaigns, legal mobilisation represents a robust framework for conceptualising study of crowdfunding. Legal mobilisation scholars have theorised and tested how use of litigation may be conditioned by campaigners' resources, and the accessibility of the justice system to litigation seeking social change, as well as exploring how litigating can impact campaigns. It analyses the interaction between institutional structures, including procedural limitations on access, and campaign actors' agency, and indeed traces the ways in which uses of agency may influence the openness of opportunity structures. As such, it is an appropriate lens through which to understand the crowdfunding phenomenon within its broader context of the conditions influencing access to judicial review for social actors. Legal mobilisation, then, provides a helpful framework for understanding crowdfunding; equally, crowdfunding is itself useful for conceptualising legal mobilisation. It is a unique resource with particular implications potentially distinct from existing understandings of resources in legal mobilisation. This project advances an account of how this unique resource may affect the dynamics of mobilisation, possibly both in broadening the types of litigant (capable of) mobilising law, and in providing wide resource benefits not limited to its monetary value, including its capacity to galvanise campaigns and engage broad publics in the potential role of legal accountability.

The core research question and sub-questions follow naturally from the legal mobilisation framework. With a nascent research agenda on crowdfunding thus far, there were several possible research questions, even once the study was framed according to the legal mobilisation literature. As indicated later, a core tension in legal mobilisation scholarship (particularly work concerned with litigation's impact), and in framing these questions, is whether to research mobilisation primarily from the top-down, examining the impacts of litigation on government and judicial institutions, or from the bottom-up prioritising understanding the perceptions and experiences of those mobilising law. While adopting features of both strands, this research is influenced considerably by the latter, more interpretivist approach. This is because there is clearly much interesting activity in the crowdfunding field, with unique implications for mobilisation scholarship, which remains 'under the surface' and yet to be explored in sufficient richness. The research thus seeks to understand the realities of crowdfunding in-depth, captured most clearly by accessing the experiences of the campaigners themselves, among other relevant actors, and exploring what is happening on the ground, including at early stages in the litigation process, for which a court-

focused top-down impact study may be less well-suited. This bottom-up framing affected the research questions adopted, with the initial choice to include sub-questions analysing the judicial review costs rules and undertaking a regulatory analysis of crowdfunding deemed less central. Though important, they are less relevant to the central interest in the experiences of crowdfunding users upon interacting with the judicial review process. That said, the research provides an evidence base to ground future considerations of both issues.

The thesis ultimately makes at least three overarching argumentative contributions. First, I argue that the shape and dynamics of crowdfunded public interest judicial review litigation – and of public interest judicial review more broadly – is different in nature than scholars have recognised. Here, the quantitative research maps for the first time the judicial review crowdfunding landscape, characterised by a greater degree of financial precarity than may be assumed, and demonstrates the underappreciated role of inexperienced litigants and local community groups in bringing 'public interest litigation'. The qualitative case studies also richly detail the interaction of crowdfunding with pre-existing costs and procedure mechanisms in judicial review, such as costs-capping and legal aid. This presents a surprising picture of crowdfunding, as an increasingly routinised feature within a patchwork of costs and funding mechanisms.

Second, I use the case studies to argue that crowdfunding represents a multifaceted resource with both material and non-material features. Though principally a material resource aiding claimants to navigate costs and funding, it is also capable of generating wider non-monetary benefits for a campaign. This includes helping actors to mobilise publicity and increase extra-legal pressure on public authorities to resolve disputes, as well as to galvanise campaigns and campaign priorities beyond the particular dispute. Such effects are commonly observed to result from litigation strategies – I argue that the act of using crowdfunding to bring that litigation, with its online interface to an audience potentially far larger than could usually be reached, can provide its own beneficial non-material effects.

Third, and pivoting somewhat, I argue that various institutional limitations restrict the scope of crowdfunded legal mobilisation, in ways which exemplify the imbalance of power in the judicial review process towards its key designer and repeat litigant: the government. These limitations include the resource burdens involved in conducting a crowdfunding campaign, which may amplify the wider rigours associated with litigating. A further limitation becomes apparent by employing an analysis of the temporal divergencies between social campaigning, the crowdfunding process, and the judicial review system, particularly its pre-action procedure.

This makes visible how the judicial review process' timescales shape claimants' crowdfunding action into strict periods, ordering the character of legal mobilisation processes. A final limitation is the concern that lay claimants and donors may place unduly high expectations in the substantive role of law to deliver social change, which the law is not structurally designed to fulfil. This final argumentative strand, then, illustrates the limitations of seeking social change through crowdfunded judicial reviews, due primarily to the institutional architecture of judicial review and the power differentials of litigation actors. These are, in broad strokes, some of the thesis' core contributions, speaking to a range of academic literatures and audiences, in addition to interested policy audiences. Much of the remainder of this chapter charts these various scholarly fields, indicating their relevance to and influence upon the project's design and insights, and how the project speaks to their research questions. Having placed the project in the context of these scholarly communities, the chapter then summarises the thesis' tripartite structure and its constituent chapters.

The interested audiences – who am I speaking to?

Crowdfunding, then, is a point of convergence for various academic, practitioner, and policy communities' interests in the operation of law, meaning this research inevitably speaks to a range of audiences. While several interconnected literatures are accordingly synthesised, decisions have necessarily been taken regarding which to emphasise in particular. The primary theoretical framework used is the legal mobilisation literature, while the research also contributes significantly, in method and substance, to scholarship on UK public law and 'public interest' or strategic litigation. There is, though, a diversity of literatures drawn upon and interested in this research.

As a tool used to enable claimants (and, on occasion, intervening parties) to litigate their justiciable problems, crowdfunding resonates naturally with the access to justice literature, particularly as a private funding model emerging amid limited state justice funding, which may raise ethical concerns around inequality. There is of course vast scholarship detailing the unfairness embedded in unequal access to justice and inequality of arms,[20] from

[20] See for instance Andrew Higgins, 'What Price Are We Willing to Pay for the Dream of Equal Justice?' (2022) 42(1) OJLS 325.

perspectives as diverse as law and economics,[21] responsibilisation,[22] and the economisation of social policy.[23] This has swelled in the wake of swingeing cuts to public justice funding under austerity in the 2010s, removing vast sections of the population, and whole areas of legal representation, from eligibility for legal aid – especially through the Legal Aid, Sentencing, and Punishment of Offenders Act 2012 (LASPO) in England and Wales.[24] Common foci of UK-based literature concerned with access to justice include reform to legal aid,[25] then, as well as practitioner fee arrangements and pro bono work,[26] and the place of progressive lawyering practices in optimising access to courts both for individuals and in pursuit of systemic change.[27] At a higher level of abstraction, valuable theoretical work conceptualises the place of markets in the justice system, and the degree of responsibility the state bears for delivering equal access to justice. Here, Wilmot-Smith, engaging with longstanding questions of equality before the law and the accounts of, amongst others Hayek and Rawls,[28] forcefully argues that market

[21] Abi Adams and Jeremias Prassl, 'Vexatious Claims: Challenging the Case for Employment Tribunal Fees' (2017) 80(3) MLR 412; Abi Adams-Prassl and Jeremias Adams-Prassl, 'Systemic Unfairness, Access to Justice and Futility: A Framework' (2020) 40(3) OJLS 561.

[22] Hilary Sommerlad and Peter Sanderson, 'Social justice on the margins: the future of the not for profit sector as providers of legal advice in England and Wales' (2013) 35(3) JSWFL 305.

[23] Jess Mant, 'Neoliberalism, family law and the cost of access to justice' (2017) 39(2) JSWFL 246.

[24] Tom Mullen, 'Access to Justice in Administrative Law and Administrative Justice' in Ellie Palmer et al (eds), *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart Publishing 2016); Jennifer Sigafoos and James Organ, 'What about the poor people's rights?' The dismantling of social citizenship through access to justice and welfare reform policy' (2021) 48(3) J.L.Soc'y 362; 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: Comparative Perspectives on Unmet Legal Need* (Hart Publishing 2017).

[25] Hilary Sommerlad, 'Some Reflections on the Relationship between Citizenship, Access to Justice, and the Reform of Legal Aid' (2004) 31(3) J.L.Soc'y 345; Ole Hansen, 'A Future for Legal Aid?' (1992) 19(1) J.L.Soc'y 85; Richard Moorhead, 'Legal Aid in the Eye of a Storm: Rationing, Contracting, and a New Institutionalism' (1998) 25(3) J.L.Soc'y 365; John Flood and Avis Whyte, 'What's wrong with legal aid? Lessons from outside the UK' (2006) 25(1) CJQ 80.

[26] Andrew Boon and Robert Abbey, 'Moral Agendas? *Pro Bono Publico* in Large Law Firms in the United Kingdom' (1997) 60(5) MLR 630; Richard Moorhead, 'CFAs: A Weightless Reform of Legal Aid?' (2002) 53(2) NILQ 153.

[27] Hilary Sommerlad, 'I've lost the plot': An Everyday Story of the 'Political' Legal Aid Lawyer' (2001) 28(3) J.L.Soc'y 335; Jacqueline Kinghan, *Lawyers, Networks and Progressive Social Change: Lawyers Changing Lives* (Hart Publishing 2021).

[28] Friedrich A Hayek, *The Constitution of Liberty* (Routledge & Kegan Paul 1960); John Rawls, *A Theory of Justice* (revised edn, Harvard University Press 1999).

distribution of legal resources makes justice outcomes dependent on arbitrary factors such as antecedent wealth, in affecting how cases fare in court but also which cases proceed that far.[29] As justice has priority over market gains, Wilmot-Smith argues from a logical diagnosis for a radical prognosis – socialised legal services provision.[30] While crowdfunding can assist individuals lacking antecedent wealth, and facilitates claims that would otherwise struggle to proceed, it arguably represents a very overt consequence of making access to justice depend on money in the wake of state funding cuts.[31] Individuals, communities, and organisations pitch their causes directly to a finite funding pool, implicitly competing for donations with other legal claims. Operating on a market logic, and working with the system as it currently functions, this dynamic resonates with the classic dilemma within pro bono debates: engaging in alternative access to justice mechanisms to plug the gaps in state provision can, in effect, enable the state to continue apace cutting funding, knowing the work of well-meaning practitioners and the third sector will obscure some of the worst impacts.[32] This conundrum is elaborated upon in the thesis.

The literature analysing civil procedure, which is closely linked to access to justice concerns, also has much to offer this research. The turn to crowdfunding has arisen in part because of the 'general rule' in English and Welsh civil procedure that the 'loser pays' the costs of the winning party in civil litigation.[33] Meanwhile, as the thesis demonstrates, the operation of crowdfunding is keenly related to, and dependent upon, civil procedure costs mechanisms, particularly costs-capping agreements. A key focus of civil procedure research is the policy, practice, and possible reform in relation to civil litigation costs, an issue with its fair share of reform attempts and consultations. In the relatively recent past, Lord Woolf has reported on civil procedure,[34] a wide review which led to the Civil Procedure Act 1997 and accompanying

[29] Frederick Wilmot-Smith, *Equal Justice: Fair Legal Systems in an Unfair World* (Harvard University Press 2019), 57-60.

[30] Higgins (n 20) notes that, while this account is persuasive, various 'second-best' options can also improve equality at lower cost.

[31] Guy (n 12), 685.

[32] Paul Yates, 'CourtNav and Pro Bono in an Age of Austerity' in Palmer et al (eds), *Access to Justice: Beyond the Policies and Politics of Austerity* (n 24).

[33] CPR 44.2(2)(a).

[34] Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO 1996).

Civil Procedure Rules, but received pushback at the time,[35] and has since been widely regarded as having counterproductive effects increasing costs.[36] Since then, and somewhat in response to ongoing disquiet post-Woolf, Lord Jackson was appointed to conduct a review of costs,[37] in which he supported reform to the general 'loser pays' rule in some categories of litigation, including judicial review, moving instead to a 'qualified one-way costs shifting' approach wherein the claimant (in judicial review) would ordinarily not be required to pay the defendant's costs, irrespective of the result.[38] Central government did not favour this more claimant-friendly reform proposal, beyond the realm of personal injury.[39] As So argues, attempts at reforming costs in civil justice, especially the 'loser pays' rule, have become a vicious cycle, with the long history of costs reform forgotten time and again. What 'remains constant' is that '[h]uman nature often prevents lawyers from becoming such enthusiastic reformers in procedural law', as defects of procedure present opportunities for lawyers at clients' expense, contributing to a 'legacy of fear of uncertainty and change'.[40] With English costs widely regarded as 'unpredictable, disproportionate and unlimited',[41] some scholars have become frustrated that, rather than approaching civil justice as a public good with an important social purpose deserving of resource just like criminal justice, the main policy developments in civil justice appear to concern keeping down system costs.[42] The other side of the costs equation concerns the appropriate funding mechanism(s) to favour, among various public and private models, and what represents the appropriate level of public subsidy balanced with

[35] Michael Zander, 'Why Woolf's Reforms Should be Rejected' in AAS Zuckerman and Ryan Cranston (eds), *Reform of Civil Procedure: Essays on 'Access to Justice'* (Clarendon Press 1995).

[36] See the following chapters in Déirdre Dwyer (ed), *The Civil Procedure Rules Ten Years On* (OUP 2009): John Peysner, 'A Blot on the Landscape'; John Sorabji and Robert Musgrove, 'Litigation, Costs, Funding, and the Future'; Michael Zander, 'The Woolf Reforms: What's the Verdict?'.

[37] Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (TSO 2009); Lord Justice Jackson, *Review of Civil Litigation Costs: Supplemental Report – Fixed Recoverable Costs* (TSO 2017). See John Sorabji, *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (CUP 2014).

[38] For dedicated discussion, see Andrew Higgins, 'A defence of qualified one way cost shifting' (2013) 32(2) CJQ 198.

[39] See Joe Tomlinson and Alison Pickup, 'Reforming Judicial Review Costs Rules in an Age of Austerity' in Andrew Higgins (ed), *The Civil Procedure Rules at 20* (OUP 2020).

[40] Winky So, 'A brief history of the law of costs – lessons for the Jackson reforms and beyond' (2013) 32(3) CJQ 333, 348.

[41] AAS Zuckerman, 'Lord Woolf's Access to Justice: Plus ça Change...' (1996) 59(6) 773, 773.

[42] Hazel Genn, *Judging civil justice* (CUP 2014) 73, 76-77.

private legal service provision – fundamentally a matter of distributive justice.[43] Crowdfunding speaks to civil justice scholarship, then, as a private litigation funding model responding to the gutting of legal aid, potentially alleviating some of the burden of funding the justice system but also raising distributive questions as to who should pay for public law claims, including in public interest litigation.[44] It also contributes to discerning the appropriate approach to costs. In this regard, the growth of crowdfunding should not be taken to negate the persuasiveness of costs reform, such as QOCS or at least an expansion of the 'Aarhus costs limits' from environmental claims to the wider caseload.[45] Crowdfunding is not only reliant very often on costs-capping procedural rules to be effective; it is in any event a very rare boon for judicial review claimants, where the 'loser pays' rule remains incredibly burdensome.

A theme resonating across the literature surveyed thus far is the place of system design in optimising justice outcomes, especially for those without antecedent wealth, and the role of the market. This aligns too with scholarship on the design of administrative justice systems, and the relative place of the individual to the state.[46] A study of crowdfunding has much of interest to, and much to gain from, this literature. Some work – although with scope for more research here – considers the design of redress systems.[47] Le Sueur, for instance, traces the array of institutional actors doing design work in the UK, including parliamentary accountability bodies, arm's length advisory bodies, local authorities, executive agencies, the Law Commission, and senior judges and courts (through rule-making committees for the Administrative Court, for instance the Civil Procedure Rules Committee, and, somewhat problematically, through judgments).[48] This range of mechanisms points to a lack of coordination across the administrative justice 'landscape', wherein different forms of redress have developed organically absent a single body with oversight or capacity for joined-up design.[49] This research highlights, for one thing, that courts are but one design actor, and,

[43] Andrew Higgins, 'The Costs of Civil Justice and Who Pays?' (2017) 37(3) OJLS 687.

[44] Shami Chakrabarti, Julia Stephens and Caoilfhionn Gallagher, 'Whose cost the public interest?' [2003] PL 697.

[45] CPR 45.41. On which, see Chapter Four.

[46] See for instance Aisling Ryan, 'The Form of Forms: Everyday Enablers of Access to Justice' (2023) S.& L.S. (EarlyView).

[47] Andrew Le Sueur, 'Designing Redress: Who Does it, How and Why?' (2012) 20(1) Asia Pacific Law Review 17; Varda Bondy and Andrew Le Sueur, *Designing redress: a study about grievances against public bodies* (Public Law Project 2012).

[48] Le Sueur (n 47), 25-29.

[49] Le Sueur (n 47), 36-37; Bondy and Le Sueur (n 47), 31.

though it holds a near-monopoly on the public law research agenda, judicial review is a quantitatively small feature of the accountability architecture for the administrative state. Scholarship studying administrative justice dispute resolution beyond judicial review emphasises this, including tribunals,[50] ombuds,[51] and administrative review internal to decision-making bodies,[52] not to mention the political science and socio-legal literature on frontline decision-making *implementing* public law.[53] The present study is, admittedly, guilty of focusing still on judicial review, although, as the following sub-section outlines, in a manner that asks new questions beyond the traditional dominant focus on theorising about grounds of review. Furthermore, some administrative justice scholarship draws attention to the risk of placing unduly high hopes in the capacity of law to deliver change, which resonates clearly with the judicial review crowdfunding context. As indicated above, work on the design of administrative justice places value in approaching services from a 'user' perspective,[54] and some have studied the dissonance between what lay people want from redress mechanisms, and what is on offer.[55] Some work in this regard has been framed using the legal consciousness conceptual device,[56] capturing the orientations of ordinary people to law and other norms that shape their world, analysing how law structures people's everyday thoughts and actions and

[50] Robert Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Hart Publishing 2011); Nick J Wikeley and Richard Young, 'The administration of benefits in Britain: adjudication officers and the influence of social security appeal tribunals' [1992] PL 238.

[51] Richard Kirkham and Chris Gill, *A Manifesto for Ombudsman Reform* (Palgrave Macmillan 2020); Marc Hertogh and Richard Kirkham, *Research Handbook on the Ombudsman* (Edward Elgar 2018).

[52] David Cowan, Simon Halliday and Caroline Hunter, 'Adjudicating the Implementation of Homelessness Law: The Promise of Socio-Legal Studies' (2006) 21(3) Housing Studies 381; Robert Thomas and Joe Tomlinson, 'A Different Tale of Judicial Power: Administrative Review as a Problematic Response to the Judicialisation of Tribunals' [2019] PL 537.

[53] See for example Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services* (Russell Sage Foundation 1980); Caroline Hunter et al, 'Legal Compliance in Street-Level Bureaucracy: A Study of UK Housing Officers' (2016) 38(1) Law & Policy 81; Maybritt Jill Alpes and Alexis Spire, 'Dealing with Law in Migration Control: The Powers of Street-level Bureaucrats at French Consulates' (2014) 23(2) S.& L.S. 261.

[54] Lorne Sossin, 'Designing Administrative Justice' (2017) 34(1) Windsor YB Access Just 87, 87.

[55] Patrick Dunleavy et al, 'Joining up citizen redress in UK central government' in Michael Adler, (ed) *Administrative Justice in Context* (Hart Publishing 2010).

[56] Chris Gill and Naomi Creutzfeldt, 'The 'Ombuds Watchers': Collective Dissent and Legal Protest Among Users of Public Services Ombuds' (2018) 27(3) S.& L.S. 367.

the way people give meaning to social life.[57] Chapter Eight offers a much fuller account of legal consciousness research, but for now it is sufficient to note that crowdfunding is certainly of interest to this audience, with lay claimants and donors placing (often somewhat illusory) faith in state law's capacity to deliver transformative change, potentially in view of a limited understanding of judicial review and civil justice,[58] and possibly engaging with the system for the first time.

The emphasis on the 'user' in administrative justice is a contentious and by now well-documented turn, representing something of a double-face.[59] At once, the 'consecration of 'the user'' has encouraged 'welcome re-balancing of priorities' towards the 'customer',[60] while framing administrative justice users as consumers and clients, with the citizen-state relationship informed by the marketplace rather than social democratic dignity.[61] This stems from a growth of managerial, consumerist, and market 'types' of administrative justice,[62] often associated with the rise of New Public Management.[63] This ambivalence toward an emphasis on consumer sovereignty – prioritising individuals' preferences but obscuring the collective emphasis on common goods in administration –[64] reflects the contested relationship between the government and the market in delivering justice, and the priority of administrative justice outcomes relative to profit and cost concerns, a tension also prevalent in recent scholarly focus on outsourcing administrative justice.[65] Though this thesis focuses on judicial review, a

[57] Simon Halliday and Bronwen Morgan, 'I Fought the Law and the Law Won? Legal Consciousness and the Critical Imagination' (2013) 66(1) CLP 1.

[58] Deficient public understanding of civil justice has been raised as a concern by, for instance, Genn (n 42), 73.

[59] Joe Tomlinson, 'The grammar of administrative justice values' (2017) 39(4) JSWFL 524.

[60] Nick O'Brien, 'Administrative Justice: A Libertarian Cinderella in Search of an Egalitarian Prince' (2012) 83(3) PQ 494, 496.

[61] Nick O'Brien, 'Administrative Justice in the Wake of I, Daniel Blake' (2018) 89(1) PQ 82, 83-85.

[62] Michael Adler, 'A Socio-Legal Approach to Administrative Justice' (2003) 25(4) Law and Policy 323. Adler expands the highly influential typology of administrative justice of Jerry Mashaw in *Bureaucratic Justice: Managing Social Security Disability* (Yale University Press 1983).

[63] Christopher Hood, 'A New Public Management for all Seasons' (1991) 69(1) Public Administration 3; Simon Halliday, *Judicial Review and Compliance with Administrative Law* (Hart Publishing 2003), 121.

[64] See also Joel D Aberbach and Tom Christensen, 'Citizens and Consumers: An NPM Dilemma' (2005) 7(2) Public Management Review 225, 241.

[65] Robert Thomas, 'Does Outsourcing Improve or Weaken Administrative Justice? A Review of the Evidence' [2021] PL 542; Richard Craven, 'Managing dissonance: bureaucratic justice and public procurement' (2023) 17(1) Regulation & Governance 215.

relatively minor feature of administrative justice,[66] crowdfunding's uneasy relationship to delivering justice certainly echoes these concerns as to market citizenship and the relative value placed on costs savings compared with a robust system of public administration and redress.

Returning to judicial review, the thesis is informed by, and contributes to, empirical scholarship on the process and impact of judicial review, taking a feature of judicial review procedure – costs and the rise of a particular funding mechanism – and studying through quantitative and qualitative methods crowdfunding's place in the landscape and its use by claimants and practitioners. As discussed shortly, such research, improving the empirical sophistication of our understanding of judicial review, has been and remains sorely lacking. Much of the pathbreaking empirical work on judicial review procedure has come from collaborations between Maurice Sunkin and colleagues, frequently with Varda Bondy. This includes dedicated studies of the permission stage,[67] out-of-court settlement,[68] and the regionalisation of the Administrative Court,[69] as well as the dynamics of claims against local authorities.[70] This work extends to understanding the impact of judicial review on the quality of public administration, a contentious field which could benefit from further research, but has been characterised by mixed results, with some studies indicating judicial review's ability to positively influence administrative decision-making is not particularly significant.[71] In their mixed-methods study of the influence of judicial review on local authorities, Platt, Sunkin, and

[66] On the interaction of the two fields, see TT Arvind, Simon Halliday and Lindsay Stirton, 'Judicial Review and Administrative Justice' in Marc Hertogh et al (eds), *The Oxford Handbook of Administrative Justice* (OUP 2021).

[67] Varda Bondy and Maurice Sunkin, 'Accessing judicial review' [2008] PL 647; AP Le Sueur and Maurice Sunkin, 'Applications for judicial review: the requirement of leave' [1992] PL 102.

[68] Varda Bondy and Maurice Sunkin, 'Settlement in judicial review proceedings' [2009] PL 237. See also Varda Bondy and Maurice Sunkin, *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing* (Public Law Project 2009) for a report output of this research project.

[69] Sarah Nason and Maurice Sunkin, 'The Regionalisation of Judicial Review: Constitutional Authority, Access to Justice and Specialisation of Legal Services in Public Law' (2013) 76(2) MLR 223.

[70] Lucinda Platt et al, 'Mapping the use of judicial review to challenge local authorities in England and Wales' [2007] PL 545.

[71] As discussed in Genevra Richardson, 'Impact Studies in the UK' in Marc Hertogh and Simon Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (CUP 2004). See for instance Simon Halliday, 'The Influence of Judicial Review on Bureaucratic Decision-Making' [2000] PL 110; Ian Loveland, *Housing Homeless Persons: Administrative Law and the Administrative Process* (OUP 1995). Jeff King has suggested these studies do not fully capture the picture, for a number of reasons, and that the contribution of judicial review is 'rosier' than appears: Jeff King, *Judging Social Rights* (CUP 2012), 70-76.

Calvo present a nuanced picture of judicial review's influence and indicate the risk of generalising about whether impact is beneficial or not,[72] while Bondy, Platt, and Sunkin have also through mixed-methods work presented an alternative perspective challenging the claim that judicial review is not a meaningful form of redress for claimants.[73] Characteristic of this research is a methodological ambition and rigour rarely seen in mainstream UK public law scholarship, particularly in employing both quantitative and qualitative methods to facilitate generalisable claims as to the landscape of judicial review, and to corroborate and add complexity and nuance to these claims by accessing the experiences of those in the field, especially practitioners. This has certainly influenced the thesis' mixed-methods design, which as such is able to at different points make generalisable and more complex, but illustrative, claims. The cumulative effect of these projects' findings has been to disrupt widely-held assumptions concerning the use and effects of judicial review in the modern administrative state, challenging common assertions of both public law scholars and government with empirical evidence.[74] In this way, these studies have laid the pathway for a small but growing number of scholars to contest and expand the means of assessing judicial review.

A different way of understanding judicial review

At the same time as I lament the popular perception of crowdfunding as frustratingly derived from a minority of non-representative and high-profile claims, some UK public law scholars are undertaking a similar, wider endeavour, increasingly impatient with the dearth of analysis of many important features of judicial review practice in a field dominated by abstract theory and largely focused on substantive grounds. These scholars have begun to use systematic empirical methods to more comprehensively capture trends in adjudication.[75] Mainstream UK doctrinal public law scholarship is, so these scholars' somewhat iconoclastic argument goes, imbalanced in focus towards espousing theories providing general principles of the common

[72] Lucinda Platt, Maurice Sunkin and Kerman Calvo, 'Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales' (2010) Journal of Public Administration Research and Theory 20 (Supplement 2) 243.

[73] Varda Bondy, Lucinda Platt and Maurice Sunkin, *The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences* (Public Law Project 2015).

[74] Maurice Sunkin and Varda Bondy, 'The Use and Effects of Judicial Review: Assumptions and the Empirical Evidence' in John Bell et al, *Public Law Adjudication in Common Law Systems: Process and Substance* (Bloomsbury 2016).

[75] See for instance Joanna Bell and Elizabeth Fisher, 'Exploring a year of administrative law adjudication in the Administrative Court' [2021] PL 505.

law grounds of judicial review. As such, 'generality' and abstraction have become central to the academic way of visualising administrative law,[76] in a 'monistic'[77] attempt to identify administrative law's 'organising concept'.[78] This conceptual emphasis, and a frankly excessive focus on common law principles in areas like reasonableness and legitimate expectations, has produced a number of unwelcome consequences for the state of scholarship, limiting the scholarly imagination as to what administrative law research can and should be.[79]

By now, a number of these criticisms should be familiar. With attention paid to a small number of precedential cases, scholarship focuses disproportionately on decision-making in the Court of Appeal and Supreme Court, which by their very nature and permission criteria deal with exceptional cases.[80] Meanwhile, the adjudicative patterns of the Administrative Court, home to far more judicial review decisions (not to mention tribunals with judicial review powers),[81] go overlooked and understudied.[82] As Sarah Nason's pathbreaking monograph indicates, this can result in the standard academic conceptions of judicial review grounds becoming divorced from the reality of Administrative Court activity.[83] Indeed, as indicated above, researchers commonly lament the disproportionate focus on judicial review itself, at the expense of studying administrative law dispute resolution mechanisms with far higher caseloads,[84] and a more regular interface with the citizenry at large, such as administrative review and tribunal decision-making, as well as public authority first instance decisions. Compared to the socio-legal scholarship on administrative justice, mainstream public lawyers

[76] Joanna Bell, 'Reason-Giving in Administrative Law: Where are We and Why have the Courts not Embraced the 'General Common Law Duty to Give Reasons'?' (2019) 82(6) MLR 983, 1004.

[77] Joanna Bell, *The Anatomy of Administrative Law* (Hart Publishing 2020), especially ch 7.

[78] To adopt Christopher Forsyth's language: 'The Rock and the Sand: Jurisdiction and Remedial Discretion' (2013) 18(4) JR 360, 368. One such concept commonly offered is the 'public interest conception': Jason NE Varuhas, 'The Public Interest Conception of Public Law: Its Procedural Origins and Substantive Implications' in Bell et al, *Public Law Adjudication in Common Law Systems* (n 74).

[79] Sarah Nason and Joanna Bell, 'Judicial review scholarship expanding legal scholarly imagination' in Carol Harlow (ed), *A Research Agenda for Administrative Law* (Edward Elgar 2023).

[80] Joe Tomlinson, 'Do we need a theory of legitimate expectations?' (2020) 40(2) LS 286, 297.

[81] Sarah Nason, 'Regionalisation of the Administrative Court and the tribunalisation of judicial review' [2009] PL 440.

[82] Bell (n 76), 1007.

[83] Sarah Nason, *Reconstructing Judicial Review* (Hart Publishing 2016), especially ch 6.

[84] Genevra Richardson and Hazel Genn, 'Tribunals in transition: resolution or adjudication?' [2007] PL 116, 118-119; Peter Cane, *Administrative Tribunals and Adjudication* (Hart Publishing 2009), 274.

have mostly been slower on the uptake,[85] with such issues falling outside 'the main field of scholarly vision' in administrative law.[86]

To the point that conventional doctrinal scholarship overly focuses on a small number of cases in appellate courts, it might be countered that this quantitative minority of claims are uniquely worthy of attention given their precedential value. In a provocative blogpost, Brian Christopher Jones argues this 'empirical movement' (such as it is) overlooks the dynamic innovations, and judicial overreach, in the common law in recent decades, something which judicial review statistics will not reveal but which is observable when studying major cases. Accordingly, he frames the empirical movement as providing a ''nothing to see here' defence of increased judicial power', not 'an objective inquiry into understanding judicial behaviour'.[87] This, however, is a frustrating example of scholars talking past one another. It could be noted that the cases receiving the most attention and fierce debate are not always the most important for understanding doctrine – the longstanding impact on the prerogative doctrine of *Miller II*[88] appears unlikely to be significant. Yet a line-by-line response to Jones' arguments is hardly necessary: in any event, the conventional focus on a small number of major cases is itself a highly partial approach to assessing judicial power. Put simply, no scholars of the 'empirical movement' would claim that referring to statistics or case outcomes alone suffices to evidence the degree of judicial power. Some accounts explicitly state and caveat this.[89] Rather, scholarship is replete with arguments of judicial overreach based on what judges say in a small number of decisions, and empirical work is a useful supplementary lens through which to

[85] With exceptions of course, such as Peter Cane's work on tribunals: Peter Cane, 'Judicial Review in the Age of Tribunals' [2009] PL 479; Cane (n 84).

[86] Elizabeth Fisher, 'Administrative Tribunals: An Essay about the Legal Imagination of Administrative Law Scholars' in James Goudkamp, Mark Lunney and Leighton McDonald (eds), *Taking Law Seriously: Essays in Honour of Peter Cane* (Hart Publishing 2021), 280. For further discussion of 'legal imagination' beyond UK public law, see Elizabeth Fisher and Sidney A Shapiro, *Administrative Competence: Reimagining Administrative Law* (CUP 2020), ch 1; Elizabeth Fisher, *Environmental Law: A Very Short Introduction* (OUP 2017), ch 5; Elizabeth Fisher, 'Legal Imagination and Teaching' in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (2nd edn, OUP 2021).

[87] Brian Christopher Jones, 'The emerging 'Nothing to See Here' judicial review defences' (UK Constitutional Law Association, 7 July 2022) <https://ukconstitutionallaw.org/2022/07/07/brian-christopher-jones-the-emerging-nothing-to-see-here-judicial-review-defences/>.

[88] *Miller v The Prime Minister* (n 16).

[89] E.g. Richard Kirkham and Elizabeth A O'Loughlin, 'Judicial review and ombuds: a systematic analysis' [2020] PL 680, 684.

interrogate these claims, including through cases' outcomes.[90] This ensures for instance that scholarly claims extrapolated from extreme cases to the wider field are not based on faulty evidence,[91] and places claims in the context of the system of adjudication as a whole, and ideally of public administration too.[92] This is not to mention the irony that, whether or not the particular authors articulate it in this way, we might find resonance in this empirical scholarship with the insightful calls from scholars of the political constitution, in the functionalist style, to avoid abstraction and seek to advance a practice-oriented and detailed explanatory account of what happens in a messy system of political and legal power,[93] albeit focused on judicial review rather than political processes. In sum, to discourage the systematic study of adjudication is, as Tomlinson observes, 'to continue to expand a theoretically refined body of scholarship with a baked-in ignorance of practice'.[94]

The critique of conventional scholarship extends to the substantive features of judicial review it implicitly deems worthy of study. The dominant focus on common law principles is said to come at the cost of proper attention towards statutory interpretation, despite its prevalence in routine adjudication,[95] representing part of a failure to take seriously the statutory frameworks specific to particular cases.[96] There is also a risk that, in pursuing generality of principles across diverse areas of decision-making, scholars miss nuance as to how adjudication is specifically practiced, developed, and tailored in bespoke areas of case law, such as

[90] Tomlinson (n 80), 299.

[91] Paul Craig, 'Judicial review, methodology and reform' [2022] PL 19, 21-23. See also Mikołaj Barczentewicz, '*Cart* Challenges, Empirical Methods, and Effectiveness of Judicial Review' (2021) 84(6) MLR 1360.

[92] Perhaps resonating somewhat with longstanding endeavours from, among others, Harlow and Rawlings to study administrative law in its public administration context, in the tradition of JAG Griffith and Harry Street: Carol Harlow and Richard Rawlings, *Law and Administration* (4th edn, CUP 2021); 'Administrative law in context: restoring a lost connection' [2014] PL 28.

[93] See for instance Graham Gee and Grégoire Webber, 'A Grammar of Public Law' (2013) 14(12) GLJ 2137; Gee and Webber, 'Rationalism in Public Law' (2013) 76(4) MLR 708; and, of course, JAG Griffith, 'The Political Constitution' (1979) 42(1) MLR 1. One scholar in the 'empirical movement', Joe Tomlinson, has explicitly drawn on these ideas in framing work around abstraction in administrative law: Tomlinson (n 59) and (n 80).

[94] Tomlinson (n 80), 299.

[95] Nason (n 83), 159; Kirkham and O'Loughlin (n 89), 686.

[96] Bell (n 77) especially ch 3; Joanna Bell, 'Rethinking the Story of *Cart v Upper Tribunal* and Its Implications for Administrative Law (2019) 33(1) OJLS 74, 99.

planning,[97] and the ombuds sector.[98] Finally, and significantly for this study, a near-universal emphasis on the grounds for judicial review decision-making has meant that other features of the judicial review process, such as procedure and remedies,[99] have been comparatively underexamined. Yet procedural rules reflect fundamental questions about the proper role of judicial review,[100] with issues such as costs key in determining who is permitted to access public law and who it serves.[101] Again, we are ill-placed to give a proper account of the judicial review system if a fixation on substantive grounds obscures that the doctrinal expansion in recent decades has occurred in view of the 'large-scale exclusion' of much of the public from being able to afford access – what Rawlings calls judicial review's 'secret history'.[102]

How, then, does the present study contribute to this iconoclastic movement and the debate around public law scholarship? Its substantive focus on costs and funding, with a consequent emphasis on the early stages of the judicial review process, draws attention to understudied features of the system. This sheds light on the financial exclusions which must caveat public law's claims to defending the individual against executive overreach, in view of the 'missing middle' excluded from legal aid (despite funding justice through taxation) nor able to afford private representation.[103] This extends empirical work into an area which has thus far

[97] Joanna Bell, 'Embracing the unwanted guests at the judicial review party: Why administrative law scholars should take planning law seriously' in Maria Lee and Carolyn Abbot (eds), *Taking English Planning Law Scholarship Seriously* (UCL Press 2022); Ole W Pedersen, 'A Study of Administrative Environmental Decision-Making before the Courts' (2019) 31(1) JEL 59; Elizabeth Fisher, 'Law and Energy Transitions: Wind Turbines and Planning Law in the UK' (2018) 38(3) OJLS 528.

[98] Kirkham and O'Loughlin (n 89); Richard Kirkham, 'Judicial review, litigation effects and the ombudsman' (2018) 40(1) JSFWL 110.

[99] C.f. Robert Thomas, 'Mapping immigration judicial review litigation: an empirical legal analysis' [2015] PL 652; Joanna Bell, 'Remedies in judicial review: confronting an intellectual blindspot' [2022] PL 200; Richard Rawlings, 'Modelling Judicial Review' (2008) 61(1) CLP 95; EA O'Loughlin, 'Government's duty of candour: on the move?' [2023] PL 567.

[100] Chris Hilson and Ian Cram, 'Judicial review and environmental law – is there a coherent view of standing?' (1996) 16(1) LS 1, 4.

[101] Joe Tomlinson, 'Foundations for a 'secret history' of judicial review: a study of exclusion as bureaucratic routine' (2019) 41(2) JSWFL 252; Joe Tomlinson 'Beyond the end of ouster clause history?' in TT Arvind et al (eds), *Executive decision-making and the courts: revisiting the origins of modern judicial review* (Hart Publishing 2021).

[102] Rawlings (n 99), 109.

[103] Higgins (n 43), 662.

received less attention even within the cadre of scholars in the so-called burgeoning 'empirical movement' (notwithstanding Bondy and Sunkin's earlier research analysing judicial review's early stages), bringing greater diversity to the conversation on the empirical study of judicial review's operation, away from grounds of adjudication. The research affords significant attention to the understudied role of the Administrative Court, including its pre-trial procedure, both quantitatively tracing litigation outcomes through their lifecycle and qualitatively analysing the relationship between crowdfunding and mechanisms such as costs-capping. In short, it provides a more systematic and comprehensive account of practice as regards the place of crowdfunding in the landscape of access to judicial review. This produces a more sophisticated understanding of crowdfunding's operation, viewed not in isolation but in the context of the other mechanisms which make judicial review funding function, and of broader challenges that condition crowdfunding's use and efficacy; it also enriches practical understanding of those mechanisms, particularly costs-capping, which remains understudied empirically. Such contextual analysis should ensure the calls for regulation of crowdfunding, emanating to varying degrees from scholarly, policy, and practitioner audiences,[104] are not out of step with, and are informed by, the realities of practice. For instance, little has been said until now about the reality that local community groups bring much crowdfunded litigation, nor about the average sums raised being modest – this is due to the absence of empirical inquiry. In practice, the crowdfunding field is substantially different in character to the cases on which most commentary is fixated, for instance those of the Good Law Project. Equally, a contextual analysis indicating crowdfunding's growing embeddedness and routinisation within the public law litigation architecture presents an important way to frame questions of the scope and target of regulation, as well as potential unintended consequences on practice, which may not be obvious when considering crowdfunding as an isolated phenomenon or absent empirical evidence.

The landscape of public interest litigation and the place of crowdfunding

The research therefore represents a necessary intervention in a debate, across policy, practice, and academia, at risk of becoming overly reactive based on a highly partial view of

[104] See for example Tomlinson (n 16); Horne (n 1). See also blogposts by solicitor James Mullen: The Law Drafter, 'GREEN PAPER: Regulation of Crowdfunded Legal Advice and Litigation' (2 December 2022) <https://thelawdrafter.substack.com/p/green-paper-regulation-of-crowdfunded>; The Law Drafter, 'WHITE PAPER: Regulation of Crowdfunding' (12 December 2022) <https://thelawdrafter.substack.com/p/white-paper-regulation-of-crowdfunding>.

crowdfunding practice. This is a contentious landscape indeed, as is the case more generally for 'public interest' litigation, a subset of judicial review litigation within which crowdfunding is especially common. The precise meaning of public interest litigation is indeterminate,[105] and little scholarly attempt has been made to proffer a definitive account – there appears a collective approach of relying on intuition, being 'easier to recognise in practice than to define in theory' –[106] we will, in other words, know it when we see it. Ramsden and Gledhill have undertaken important work to systematically define the term 'strategic litigation', a related concept (as is test case litigation). Their definition incorporates: a 'legacy component' seeking legal or extra-legal effects beyond the individual litigant; the legal issues before the court will be novel or involve reconsidering a previous approach; and it is not attached to a specific cause.[107] This adds helpful flesh to the definitional bones, although I argue in Chapter Two that their categorisation does not account for much litigation brought by collective actors which, although not raising novel legal issues and turning primarily on facts, seeks extra-legal effects for a community beyond the individual litigant, for instance preserving local heritage assets amid development. Instead, I offer a typology of collective forms of litigation, accounting for a broader range of uses of litigation in the public interest.

The law has historically proven hostile towards public interest litigation in the UK and elsewhere,[108] but the legal climate in recent years has been acutely frosty towards judicial review by civil society.[109] Samuels suggests government unease towards the practice is symptomatic of a change in executive receptivity to civil society advocacy since the Coalition period,[110] which favours local activism and voluntary services to national policy campaigning.[111] As Chapter Four discusses, recent Conservative governments have directed considerable attention towards reducing interest groups' use of courts to continue 'politics by another means',[112] both attempting legislative reform and generating hostile narratives as to the

[105] Penny Martin, 'Defining and Refining the Concept of Practising in the Public Interest' (2003) 28 Alt LJ 3, 4.

[106] Richard Clayton KC, 'Public interest litigation, costs and the role of legal aid' [2006] PL 429, 441.

[107] Michael Ramsden and Kris Gledhill, 'Defining strategic litigation' (2019) 38(4) CJQ 407, 411-14.

[108] Michael Kirby, 'Deconstructing the law's hostility to public interest litigation' (2011) 127 LQR 537.

[109] Harriet Samuels, 'Public interest litigation and the civil society factor' (2018) 38(4) LS 515, 515.

[110] ibid 520-522.

[111] Harriet Samuels, 'A National Treasure? The Role of Civil Society in Promoting and Enforcing Human Rights in the United Kingdom' (2020) 12(3) JHRP 711, 715.

[112] A phrase also used beyond the realm of party politics. See for instance Aidan O'Neill, 'Strategic litigation before the European Courts' (2015) 16(4) ERA Forum 495, 496.

role of lawyers in polycentric matters. Crowdfunding has added a further degree of contention into this already fractious debate. Tomlinson has suggested that crowdfunding moves the model of public interest litigation from a relatively 'closed' system with a regular set of repeat player litigants, such as Liberty and the Public Law Project, towards a more 'open' door with a more diverse, yet also less structured and potentially less professionalised, array of litigants.[113] Chapter Two gives weight to this notion, and it is prone to increase establishment concern as to the misuse of courts, and perhaps intensify calls for scrutiny. Yet the thesis also indicates crowdfunding has become relatively routinised in the practice of bringing public interest litigation, with implications that have been comparatively overlooked. While standing has probably been the procedural feature receiving most attention in relation to public interest litigation,[114] and third-party interventions have also provoked considerable discussion,[115] costs have tended to receive less dedicated focus, even though, as McCorkindale and Scott highlight, the restrictive costs regime has enabled the government to close the court doors to public interest litigants in a way they would never dare through legislation.[116] Refreshingly, some scholarship has begun to highlight this function of costs, and the role of costs-capping orders (previously known as protective costs orders) alongside legal aid in alleviating the costs burden.[117] In contrast to how significant a development crowdfunding is, and its dominance over the imagination of lawyers, the place of crowdfunding in this patchwork of costs protection is insufficiently understood. Of course, the rules structuring the practice of public interest litigation are reflective of a society's 'constitutional ethic' and conception of public law,[118] but if we are to express views on whether and how we foresee crowdfunding fitting into this landscape, it is important to first understand how it operates at present. As I suggest, this is more routinised than has been appreciated. Given the prevalence of individuals,

[113] Tomlinson, *Justice in the Digital State* (n 11), 32-33.

[114] Gordon Anthony, 'Public Interest and Three Dimensions of Judicial Review' (2013) 64 NILQ 125, 132.

[115] Sarah Hannett, 'Third party intervention: in the public interest?' [2003] PL 128. See for recent policy-oriented critique of interventions Anthony Speaight KC, *How and Why to Constrain Interveners and Depoliticise Our Courts* (Policy Exchange 2022).

[116] Chris McCorkindale and Paul Scott, 'Public Interest Judicial Review in Cross-Border Perspective' (2015) 26(3) K.L.J. 412, 425.

[117] ibid; Tom Mullen, 'Protective Expenses Orders and Public Interest Litigation' (2015) 19(1) Edin.L.R. 36; Clayton (n 106).

[118] David Feldman, 'Public Interest Litigation and Constitutional Theory in Comparative Perspective' (1992) 55(1) MLR 44, 44, 51.

communities, and organisations using crowdfunding to litigate in pursuit of wider goals at local or national scales, as Chapter Two demonstrates, it is prudent for the thesis to employ a conceptual framework which robustly theorises the use of law for social change. As such, the legal mobilisation literature provides an apt device for understanding the field.

The legal mobilisation framework

The above literatures have, to varying degrees, informed the thesis' formation and analysis. The project's core theoretical focus, and the framing of the research question, though, is influenced primarily by the legal mobilisation literature. 'Legal mobilisation' has been used most prominently to refer to attempts of activists – across a broad spectrum of social movements –[119] to challenge the law's current state, and especially the use of litigation as a strategy within wider campaigns for social change.[120] This literature has represented a fruitful turn in social movement scholarship, which traditionally underplayed litigation's place in campaign strategies.[121] Such a conception of legal mobilisation, limited to the use of law by social movements in pursuit of change, is not universally adopted though – some sociolegal scholarship applies the term even to litigation which is self-interested and concerned with purely individual entitlement. Lehoucq and Taylor argue that these points of discord, and a lack of unifying conceptualisation, have led to 'conceptual slippage' and an overly inclusive and insufficiently coherent literature.[122] They define legal mobilisation as 'the use of law in an explicit self-conscious way through the invocation of a formal institutional mechanism'. Developing a typology of uses of law, they differentiate mobilisation from legal framing – 'the use of law in an explicit self-conscious way to give meaning to an event' – and legal

[119] Including conservative mobilisation, albeit this remains under-researched: see Aaron J Ley, 'Mobilizing Doubt: The Legal Mobilization of Climate Denialist Groups' (2018) 40(3) Law and Policy 221; Dennis R Hoover and Kevin R den Dulk, 'Christian Conservatives Go to Court: Religion and Legal Mobilization in the United States and Canada' (2004) 25(1) IPSR 9; Latoya Lazarus, 'Enacting citizenship, debating sex and sexuality: conservative Christians' participation in legal processes in Jamaica and Belize' (2020) 58(3) Commonwealth & Comparative Politics 366.

[120] Steven A Boutcher and Holly J McCammon, 'Social Movements and Litigation' in David A Snow et al (eds), *The Wiley Blackwell Companion to Social Movements* (2nd edn, John Wiley & Sons 2018), 307.

[121] Frances Kahn Zemans, 'Legal Mobilization: The Neglected Role of the Law in the Political System' (1983) 77(3) APSR 690, 691.

[122] Emilio Lehoucq and Whitney K Taylor, 'Conceptualizing Legal Mobilisation: How Should We Understand the Deployment of Legal Strategies?' (2020) 45 L.& Soc.Inquiry 166, 168.

consciousness – 'the implicit nonarticulated use of law to give meaning to an event'.[123] Though some regard this definition of legal mobilisation as unduly narrow compared to the potential scope of research in the area,[124] it does offer much-needed conceptual structure, and usefully contextualises the scholarship in relation to other sociolegal work on uses of law, highlighting distinct opportunities for interactions across these research agendas, which this thesis explores. With these concerns in mind, the thesis conceptualises legal mobilisation in a way that retains the focus on legal strategies in pursuit of social impact, which it is submitted is a distinctive component of legal mobilisation, excluding litigation concerned only with individual entitlement. This minimises the risk of 'slippage' and of legal mobilisation being subsumed into broader sociolegal scholarship on litigation and dispute resolution.

Leaving aside these meta-questions of definitional scope and turning to the core research foci of the field, legal mobilisation scholarship is often situated within two research interests: first, explaining the structural and organisational factors that affect whether social actors use law, often social movement organisations; and second, analysing the effects, direct and indirect, of using law in these endeavours. Research primarily focuses on proactive litigation, where groups positively decide to litigate (such as bringing a judicial review), but some have studied reactive litigation, where movement actors have litigation forced upon them (such as defendants in criminal damage prosecutions) –[125] albeit the explanatory theories may differ for reactive strategies.[126] On the first research interest, several factors have been offered and tested to explain why actors (do not) choose to litigate in pursuit of change, and while many have tried, no one theoretical approach fully explains mobilisation dynamics.[127] The core factors commonly studied are the influence of political and legal opportunity structures (POS and LOS), organisations' resource mobilisation, and organisations' internal identities.

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[123] ibid 178-9.

[124] Carolyn Abbot and Maria Lee, *Environmental Groups and Legal Expertise: Shaping the Brexit process* (UCL Press 2021), 35.

[125] See Carol Harlow and Richard Rawlings, *Pressure Through Law* (Routledge 1992), 7; Chris Hilson, 'UK Climate Change Litigation: Between Hard and Soft Framing' in Stephen Farrall, Tawhida Ahmed and Duncan French, *Criminological and Legal Consequences of Climate Change* (Hart 2012).

[126] See Brian Doherty and Graeme Hayes, 'Having Your Day in Court: Judicial Opportunity and Tactical Choice in Anti-GMO Campaigns in France and the United Kingdom' (2014) 47(1) Comp.Pol.Stud. 3.

[127] Lisa Vanhala, 'Is Legal Mobilization for the Birds? Legal Opportunity Structures and Environmental Nongovernmental Organizations in the United Kingdom, France, Finland, and Italy' (2018) 51(3) Comp.Pol.Stud. 380, 406.

The opportunity structure strand of theory has developed from scholarship on political opportunity structures emerging since at least the 1980s,[128] which posits that countries' distinct political contexts can usefully explain variations in movement group strategy, in facilitating or constraining to varying degrees movement organisations' strategies.[129] Political context is distinguished across two variables within a typology: input structures – how open a system is for new groups to access decision-making – and output structures – how strong and effective a country is in policy implementation.[130] As such, the POS denotes openness of access to political institutions, the stability of political alignments, and the availability of potential political allies.[131] These ideas have of course been refined, and this field has at times been characterised by a tension between simplified but informative concepts and greater empirical precision.[132] For present purposes, it is sufficient to note that the POS variable has some explanatory power accounting for movements' political strategies, and gave rise to the LOS concept addressing litigation strategies. Although litigation has grown as a movement strategy in view of the 'judicialisation of politics' – the displacement of political disputes from democratic venues to courts with human rights and constitutional adjudication powers –[133] POS theorists traditionally afforded courts insufficient recognition as distinct sites of opportunity, leading early adopters like Chris Hilson to suggest a bespoke concept of 'legal opportunity' explaining recourse to litigation strategies.[134] Hilson suggests legal opportunity comprises both structural

[128] The term seems to have first appeared in Peter Eisinger, 'The conditions of protest behavior in American cities' (1973) 81 Am. Polit. Sci. Rev. 11, but the first systematic study was not forthcoming until 1986.

[129] Herbert P Kitschelt, 'Political Opportunity Structures and Political Protest: Anti-Nuclear Movements in Four Democracies' (1986) 16 B.J.Pol.S 57.

[130] ibid 64.

[131] Hanspeter Kriesi, 'The Political Opportunity Structure of New Social Movements: Its Impact on Their Mobilization' in J Craig Jenkins and Bert Klandermans (eds), *The Politics of Social Protest: Comparative Perspectives on States and Social Movements* (University of Minnesota Press 1995), 167.

[132] See for instance the astute critique of Chris A Rootes, 'Political Opportunity Structures: promise, problems and prospects' (1999) 10 La Lettre de la maison Française d'Oxford 75.

[133] This is itself a focus of related academic literature, predominantly in political science and often in relation to the EU. See for instance Maurice Sunkin, 'Judicialization of Politics in the United Kingdom' (1994) 15(2) International Political Science Review 125; R Daniel Kelemen 'Judicialisation, Democracy and European Integration' (2013) 49(3) Representation 295; Ran Hirschl, 'The Judicialization of Politics' in Gregory A Caldeira, R Daniel Kelemen, and Keith E Whittington (eds), *The Oxford Handbook of Law and Politics* (OUP 2008); R Daniel Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Harvard University Press 2011).

[134] Chris Hilson, 'New social movements: the role of legal opportunity' (2002) 9(2) JEPP 238.

and more contingent features, such as individual judges' receptivity to policy arguments.[135] He noted that political and legal strategies interact in important ways – for instance, though strategies are not always straightforwardly preference-based, a restrictive POS may influence uptake of litigation, while a hostile POS and unaffordable LOS may encourage the adoption of protest.[136] Indeed, some scholarship such as that of Abbot and Lee, works at the intersection of political and legal opportunities, studying use of legal expertise in political venues, in an attempt to move beyond the academic preference for studying cases and courts over legislatures.[137]

As regards the empirical dimensions of the LOS, there is room for disagreement, but Andersen suggests it includes: access to legal institutions (including 'legal stock', that is, the existing legal categories and rights within which claims must be articulated); the availability of allies and opponents to stimulate litigation; and configurations of power, including judicial attitudes towards relevant policy issues.[138] There is rare consensus that rules on access to justice, including standing and costs, are central in delineating the LOS.[139] As it happens, these straightforwardly structural features are of most relevance to this thesis. At their core, LOS accounts, and particularly those analysing procedural rules, demonstrate how seemingly technical legal rules can have significant socio-political consequences affecting the degree of sustained participation by movement groups.[140] The normative limitations and restraints concerning the social demands and values that are acceptable within a given legal system will also condition litigation.[141] This represents an even more fundamental barrier than structural rules, and resonates with David Feldman's aforementioned notion of a 'constitutional ethic'.[142]

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[135] ibid 243.

[136] ibid 250.

[137] Abbot and Lee (n 124), 9.

[138] Ellen Ann Andersen, *Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation* (University of Michigan Press 2004), 9, 208-210.

[139] Lisa Vanhala, 'Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK' (2012) 46 L.& Soc'y Rev 523, 539; Lisa Vanhala, 'Civil Society Organisations and the Aarhus Convention in Court: Judicialisation From Below in Scotland?' (2013) 49(3) Representation 309.

[140] Celeste L Arrington, 'Hiding in Plain Sight: Pseudonymity and Participation in Legal Mobilization' (2019) 52(2) Comp.Pol.Stud. 310, 332.

[141] Jack Meakin, 'The opportunity and limitation of legal mobilisation for social struggles: a view from the Argentinian factory recuperation movement' (2022) 18(2) Int. J.L.C. 196.

[142] Feldman (n 118), 44.

Interestingly, Evans Case and Givens include 'resources for legal advocacy' within the LOS,[143] explicitly connecting organisational resource mobilisation, discussed shortly, with structural conditions on access. This probably overstretches the definition of 'structure', resembling at most a contingent feature of legal opportunity. Yet it does draw attention to an important point when approaching crowdfunding: organisations' ability to find funding and legal representation, generally deemed an issue internal to groups, is itself conditioned by wider politico-legal factors. Organisations' use of crowdfunding might result from limited access to other funding options, and successful fundraising relies on citizens being sufficiently motivated by social issues to donate. This resonates with a growing recognition that movement actors may influence the LOS' configuration. While the LOS is a separate variable from internal organisational factors, and has relatively entrenched features, the shape of those features may change over time, potentially influenced by processes of advocacy and meaning-making by NGOs, and courts.[144] Judges can, for instance, expand or contract the somewhat elastic standing rules.[145] Movement actors can therefore forge legal opportunities and affect existing configurations,[146] in a process of 'opportunity-making' which may be iterative through 'trial-and-error'.[147] In this way, we see the classic interaction (or tension) of structure and agency. Movements' use of law is not fully explainable by purely structural nor purely internal organisational accounts, and those accounts are not irreconcilable. Litigants ought not be treated as 'black boxes', as some structural research risks doing – rather, their perceptions and mobilisation of resources and legal opportunities are important.[148] Without organisations having expertise to recognise and use opportunities for participation, for instance, expanded opportunity structures are of little tangible use.[149] As discussed subsequently, crowdfunding

[143] Rhonda Evans Case and Terri E Givens, 'Re-engineering Legal Opportunity Structures in the European Union? The Starting Line Group and the Politics of the Racial Equality Directive' (2010) 48(2) JCMS 221, 223.

[144] Lisa Vanhala, 'Shaping the Structure of Legal Opportunities: Environmental NGOs Bringing International Environmental Procedural Rights Back Home' (2018) 40(1) Law and Policy 110, 112, 124.

[145] Rachel A Cichowski and Alec Stone Sweet, 'Participation, Representative Democracy, and the Courts' in Bruce E Cain, Russell J Dalton, and Susan E Scarrow (eds), *Democracy Transformed? Expanding Political Opportunities in Advanced Industrial Democracies* (OUP 2003), 216.

[146] Vanhala, 'Legal Opportunity Structures and the Paradox of Legal Mobilization' (n 139), 536, 539.

[147] Ruud Koopmans, 'The missing link between structure and agency: Outline of an evolutionary approach to social movements' (2005) 10(1) Mobilization 19, 28.

[148] Lisa Conant et al, 'Mobilizing European law' (2018) JEPP 25(8) 1376, 1382.

[149] Virginia Passalacqua, 'Legal mobilization via preliminary reference: Insights from the case of migrant rights' (2021) 58(3) CMLR 751, 767.

occupies an interesting position in this dynamic between legal opportunity and resource mobilisation.

Scholars have long highlighted that movement groups' capacity to accrue and organise professional, financial, and educational resources goes some way to conditioning their strategy choice, with political strategies like lobbying available primarily to those with professional backgrounds respected by policymakers, and legal routes reserved for the financially resourced.[150] Legal mobilisation is thus often closely linked to resources of wealth and expertise, meaning it may reinforce, rather than subvert, a conservative status quo.[151] These observations stem from Galanter's classical observations that 'repeat players' fare better in litigation than 'one-shotters' due to resource – unless one-shotters can gain the resource-related advantages experienced by repeat players.[152] Where legal institutions introduce restrictive rules to reduce volumes of litigation, the more formalised actors capable of understanding rights, navigating procedures, and accepting costs risks are advantaged.[153] As such, Charles Epp has argued that, for litigation to be an effective campaign strategy, a 'support structure for legal mobilization' – which he regards as including 'rights-advocacy lawyers, rights-advocacy organizations, and sources of financing' for sustained litigation – is necessary (but not sufficient).[154]

A considerable range of resources help facilitate sustained mobilisation. Following observations by the 1980s that 'resource' remained one of social movement scholarship's 'most primitive and unspecified terms',[155] researchers have conceptualised the array of movement resources. Edwards and McCarthy offer a useful typology – adapted from the inductive research of Cress and Snow –[156] distinguishing material, moral, cultural, social-organisational,

[150] Hilson (n 134), 240-241.

[151] Navraj Singh Ghaleigh, '"Six honest serving-men": Climate change litigation as legal mobilization and the utility of typologies' (2010) 1 Climate L 31, 35.

[152] Marc Galanter, 'Why the Haves Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9 L.& Soc'y Rev 95.

[153] ibid 119, 121.

[154] Charles Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press 1998), 18.

[155] William A Gamson, Bruce Fireman and Steven Rytina, *Encounters with Unjust Authority* (Dorsey 1982), 82.

[156] Daniel M Cress and David A Snow, 'Mobilization at the Margins: Resources, Benefactors, and the Viability of Homeless Social Movement Organizations' (1996) 61(6) American Sociological Review 1089.

and human resources.[157] Within this, moral resources refer to legitimacy, solidarity, sympathy, and celebrity, while cultural resources include specialist strategic knowledge, and cultural products such as newspapers and films that enable recruitment to a cause.[158] This attentiveness to wide-ranging resources beyond the material is influenced by Bourdieusian observations that unequal access to economic, cultural, and social capital structures social relations – a formulation of capital that transcends a narrowly economistic view.[159]

This approach within social movement studies has, in turn, influenced understandings of resource for legal mobilisation. In surveying scholarship prior to 2005, Andersen notes eight organisational resources commonly raised as affecting legal mobilisation efforts. First, (expert) staff to manage cases and respond to new litigation opportunities; second, an internal organisation coordinating litigation; third, skill in coalition-building; fourth, the capacity to generate publicity around a case; fifth, sufficient funding for litigation; sixth, control over initiating and developing a case; seventh, a timeline sufficiently long as to engage in repeat litigation; and eighth, though less relevant in the UK, support from state departments.[160] As with other social movement strategies, there are, then, different forms of resource for legal mobilisation. Inspired by the social movement scholars' taxonomies, Aspinwall crucially distinguishes types of legal mobilisation resource: material – money and people – and non-material – legal, informational, and normative resources.[161] This is key for conceptualising crowdfunding's multifaceted resource functions. Of course, its primary role is material – litigants would not crowdfund if they did not need finance to access judicial review. However, as argued in Chapter Five, crowdfunding can also serve wider non-material purposes, particularly for less experienced groups, such as generating publicity, galvanising focus around

[157] Bob Edwards and John D McCarthy, 'Resources and Social Movement Mobilization' in David A Snow, Sarah A Soule and Hanspeter Kriesi (eds), *The Blackwell Companion to Social Movements* (Wiley-Blackwell 2004), 125.

[158] ibid 125-126. See also Bob Edwards, John D McCarthy and Dane R Mataic, 'The Resource Context of Social Movements' in David A Snow et al (eds), *The Wiley Blackwell Companion to Social Movements* (2nd edn, Wiley-Blackwell 2019).

[159] Pierre Bourdieu, 'The Forms of Capital' in John G Richardson (ed), *Handbook of Theory and Research for the Sociology of Education* (Greenwood Press 1986); Pierre Bourdieu and Loic Waquant, *Introduction to Reflexive Sociology* (University of Chicago Press 1992).

[160] Andersen (n 138), 4-5.

[161] Mark Aspinwall, 'Legal mobilization without resources? How civil society organizations generate and share alternative resources in vulnerable communities' (2021) 48(2) J.L.Soc'y. 202, 209.

campaigns, consciousness-raising among campaigns' bases, and shaping internal priorities. As such, crowdfunding can represent both a pool of money shielding litigants from financial peril, and a tool helping actors to upscale and formalise their campaigning. As will be discussed, normative resource appears the most relevant non-material resource to crowdfunding, and includes the capacity to 'communicate and project legitimacy' and 'generate support'. This can be generated through discourse and framing of injustices, that is, communicative strategies that attract media publicity, amplify messages, widen the base of public support and moral sympathy, and increase the credibility and leverage of groups and their claims.[162] The framing of a legal dispute as an injustice to the public can thus produce greater participation and support, both for resolving the particular grievance, and for movement-building beyond that case – as such, the wider public might represent 'co-addressees' of legal claims, alongside defendants.[163]

In many ways, crowdfunding fits naturally within conventional resource mobilisation accounts. It is a financial 'support structure' enabling groups to navigate procedural rules and access litigation, and arguably resonates with the broader conception of resources, creating opportunities to generate publicity online, partner with allies, and sustain repeat litigation. As Vanhala observes, resource mobilisation theories often focus on organisations' internal resources, but external resource avenues are also important in facilitating litigation.[164] Crowdfunding encapsulates this in a novel manner – it is not state-provided, but is external to any individual organisation and represents a key resource stream which groups can pursue, in a more democratised manner than (for instance) grant funding. There may also be a further conceptual dimension at play, though, which again demonstrates the elasticity of structure and agency between the LOS and organisations' resource mobilisation. Crowdfunding is, as McCorkindale and McHarg note, a response to legal aid budget cuts and, in contrast to the individualist philosophy of legal aid, better facilitates group litigation.[165] If, as Hilson does, we regard the availability of state legal funding as a feature of a nation's legal opportunity structure,[166] there is perhaps reason to conceptualise crowdfunding as a hybrid privatised and less structural form of legal opportunity. Indeed, Yam suggests crowdfunding functions 'like a

[162] ibid 210-211.

[163] Ghaleigh (n 151), 61.

[164] Lisa Vanhala, *Making Rights a Reality? Disability Rights Activists and Legal Mobilization* (CUP 2011), 258.

[165] McCorkindale and McHarg (n 10), 287-288; see also Harlow and Rawlings (n 125), 115.

[166] Hilson (n 134), 243.

civil society version of a legal aid system'.[167] While not facilitated by the state, a factor key to accounts of opportunity structures, crowdfunding operates in the gaps left by the shrinking state – with responsibility for providing access to justice increasingly shifted to private actors – to perform a similar function. It is certainly arguable that, as crowdfunding has become more entrenched within the funding landscape, it resembles a citizen-led substitute legal opportunity. At the very least, it is a civil society response to a top-down constricting of the legal opportunity structure, and an attempt to forge open legal opportunity.

The third core variable increasingly offered in explaining legal mobilisation is organisational identity. When considering organisations' internal priorities, it is insufficient to merely assume resources entirely condition strategy adoption.[168] Rather, a movement actor or organisation's identity politics are important – their orientation in relation to politico-legal systems can affect their choice whether to use establishment mechanisms.[169] This growing strand of theory draws upon work on how human and organisational action is driven in part by 'logics of appropriateness' – the rules of behaviour seen as natural and legitimate in a particular environment, which can guide actors' conduct in specific situations.[170] For instance, whether organisations regard courts as appropriate venues to contest rights can influence their strategy adoption.[171] It also accounts for how organisations' framing of particular issues can affect the strategy adopted.[172] Whereas instrumental groups will adopt whichever strategy is needed to achieve a substantive aim, groups which are countercultural or subcultural may resort to direct action rather than use even favourable legal or political structures.[173] Meanwhile, a willingness or preference for litigating within policy battles can help explain the paradox of some groups' commitment to using courts in the face of repeated defeats.[174] For groups with politically and

[167] Yam (n 9), 413.

[168] Vanhala (n 164), 23-24.

[169] Hilson (n 134), 241. Lisa Vanhala, 'Anti-discrimination policy actors and their use of litigation strategies: the influence of identity politics' (2009) 16(5) JEPP 738.

[170] James G March and Johan P Olsen, 'The Logic of Appropriateness' in Robert E Goodin, Michael Moran, and Martin Rein (eds), *The Oxford Handbook of Public Policy* (2nd edn, OUP 2008), 691.

[171] Sophie Jacquot and Tommaso Vitale, 'Law as weapon of the weak? A comparative analysis of legal mobilization by Roma and women's groups at the European level' (2014) 21(4) JEPP 587, 597.

[172] Robert D Benford and David A Snow, 'Framing Processes and Social Movements: An Overview and Assessment' (2000) 26 Annual Review of Sociology 611, 615-617. See also Vanhala (n 169), 743.

[173] Hilson (n 134), 241.

[174] Vanhala, 'Legal Opportunity Structures and the Paradox of Legal Mobilization' (n 139), 544.

legally marginalised identities, they may have to adjust identity discourses to fit more neatly within dominant identity frames.[175] This research agenda represents a welcome turn, introducing greater nuance and complexity. It is, though, less relevant to the present thesis, which is less concerned with testing why actors (do not) turn to law than with understanding the experiences of mobilising crowdfunding to access a relatively inhospitable LOS among those who have decided to litigate. In this way, as raised in Chapter Three, the thesis resonates with mobilisation scholarship that provides rich qualitative understanding of the process of mobilising law through case studies, for instance work by Abbot and Lee,[176] and Vanhala and Kinghan.[177]

As indicated, the other focus of much legal mobilisation much scholarship, in common with aforementioned empirical work in judicial review, is the multifaceted question of impact. This occupied early scholars of courts and social change. Galanter argued in 1974 that court remedies have limited capacity to facilitate reform as they must comply with institutional structures and traditions, while Rosenberg in 1991 strikingly termed courts a 'fly-paper', luring in campaigners to transfer substantive political battles to legal venues, where any victories and precedents will often be symbolic in nature and provoke government policy backlash.[178] Yet scholarship since then has problematised this 'backlash' thesis,[179] and taken a wider perspective on the notion of 'impact', indicating that litigation often represents a useful site for movement groups. Michael McCann has been particularly influential here, using an interpretive 'bottom-up' methodological approach to suggest that, though institutionalised legal practices may be fairly regarded as conservative and as designed to maintain hegemonic order, as Rosenberg and others argue, we should pay attention to the opportunities provided for creative challenge in certain contexts.[180] If we decentre focus from how courts process claims, to study the agency

[175] Lisa Harms, 'Claiming Religious Freedom at the European Court of Human Rights: Socio-Legal Field Effects on Legal Mobilization' (2021) 46(4) L.& Soc.Inquiry 1206, 1208.

[176] Abbot and Lee (n 124).

[177] Lisa Vanhala and Jacqueline Kinghan, 'The 'madness' of accessing justice: legal mobilisation, welfare benefits and empowerment' (2022) 44(1) JSWFL 22.

[178] Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (University of Chicago Press 1991), 341.

[179] Thomas M Keck, 'Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights' (2009) 43(1) L.& Soc'y Rev 151.

[180] Michael W McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (University of Chicago Press 1994), 9.

of actors in choosing to litigate for potentially wider goals than legal precedent, litigation can be seen to offer greater value than otherwise recognised.[181] Accordingly, even legal defeats can benefit campaigns, such that actors may regard this as 'los[ing] the battle but win[ning] the war';[182] the mere presence of a claim may strengthen the rationale for protest, or generate publicity,[183] meaning organisations can gain support in the 'court of public opinion'.[184] Temporally, these diffuse impacts can occur well before a judicial decision, and can include influencing public discourses as well as policy and frontline practice,[185] and raising rights consciousness among the organisation's base.[186] The realistic threat of litigation, and the uncertainty of its prospective outcome, can itself represent a useful bargaining chip.[187] One might fairly counter that some of the claims that law *can* be a useful resource are so contingent as to be of limited use.[188] Yet this scholarship rightly highlights the importance of attentiveness to actors' agency in choosing to mobilise law to pursue their goals, rather than generalising as to courts' ineffectiveness by virtue of a 'top-down' assessment prioritising legal impacts – precisely why Rosenberg's 'fly-paper' metaphor perhaps overgeneralises. Indeed, Andersen persuasively suggests litigation is instead a 'match' that is unpredictable when struck – either fizzling out and failing to advance the cause, or in the right circumstances lighting a path toward progress.[189] Research on impact is less directly implicated in crowdfunding than the literature on opportunity structures and resources, however this interpretivist perspective toward impact does inform my framing of crowdfunding's utility as a non-material resource, presenting

[181] Boutcher and McCammon (n 120), 306.

[182] Vanhala, 'Legal Opportunity Structures and the Paradox of Legal Mobilization' (n 139), 545.

[183] Jefferey M Sellers, 'Litigation as a Local Political Resource: Courts in Controversies over Land Use in France, Germany, and the United States' (1995) 29 L.& Soc'y Rev 475, 502.

[184] Christopher J Hilson 'Environmental SLAPPs in the UK: threat or opportunity?' (2016) 25(2) Environmental Politics 248, 254.

[185] Lisa Vanhala, Shauneen Lambe and Rachel Knowles, ''Let Us Learn': Legal Mobilization for the Rights of Young Migrants to Access Student Loans in the UK' (2018) 10(3) JHRP 439, 440.

[186] McCann (n 180), 281-283; Harms (n 175), 1217.

[187] McCann (n 180), 280. See Galanter's concept of 'litigotiation': Marc Galanter, 'Worlds of Deals: Using Negotiation to Teach about Legal Process' (1984) 34(2) Journal of Legal Education 268, 268. For the impacts on policymaking of the threat of judicial review, see Catherine Haddon, Raphael Hogarth and Alex Nice, *Judicial review and policy making: The role of legal advice in government* (Institute for Government 2021).

[188] Gerald N Rosenberg, 'Positivism, Interpretivism, and the Study of Law' (1996) 21(2) L.& Soc.Inquiry 435, 453.

[189] Andersen (n 138), 218.

potential beneficial effects going beyond the immediate litigation, such as helping galvanise a campaign and influencing future campaign identity frames and choices.

The legal mobilisation framework, then, provides a useful theoretical architecture for exploring crowdfunding's operation by actors seeking socio-political outcomes, framing observations as to the place of crowdfunding in the modern matrix of legal strategy adoption. At the same time, resource mobilisation and opportunity structures accounts are themselves strengthened by understanding crowdfunding, due to its increasing use to access litigation in conjunction with features of the LOS, such as costs-capping, and of resource mobilisation, such as legal expertise from lawyers acting for reduced fees. As such, the thesis' research question, focusing on the place of crowdfunding in legal mobilisation, is well-placed to yield novel understanding of crowdfunding and its unique role in the modern context of mobilisation.

The structure of the thesis

The thesis comprises nine chapters, across three overarching parts. Part One (containing Chapters One to Three) provides the thesis its baseline, establishing the relevant literatures, the landscape of crowdfunding, and the project's research design. Part Two (consisting of Chapters Four and Five) positions crowdfunding as a resource drawn upon by public interest litigants in facilitating legal mobilisation. It approaches crowdfunding both as a material resource in funding claims, acting alongside existing access to justice mechanisms, and as a non-material resource, operating as a cultural and rhetorical device enabling public campaigns to be galvanised and sustained. Part Three (which comprises Chapters Six to Eight) presents the challenges associated with litigating using crowdfunding, highlighting the resource burden it creates, its uneasy temporal relationship with the structures of the judicial review process, and the potential disconnect between campaigners' expectations of law and what it can deliver. Finally, Chapter Nine concludes with a theoretical overview and an eye to the future of the research agenda on crowdfunding.

Following this introduction, which has outlined the thesis' contribution to various interrelated literatures, Chapter Two undertakes a systematic quantitative analysis of the crowdfunding landscape, using data regarding 413 claims advertised on CrowdJustice.com. It makes a core argument that the common picture emerging of crowdfunding, centred on high-profile, well-funded, and politically contentious cases, is highly partial. Much collective litigation (which we might regard as 'public interest') crowdfunds modest sums and the costs

burden continues its attrition of claims. Equally, it argues much collective crowdfunded litigation occurs by inexperienced litigants, and by local-level community groups, meaning the character of legal mobilisation is radically more diverse than simply the 'usual suspects' of strategic litigation. Accordingly, it advances a typology of crowdfunded collective legal mobilisation – across dimensions of litigation experience and geographical locus – which structures the selection of illustrative qualitative case studies. Chapter Three then outlines the methodology for that qualitative research, outlining the multiple-case study research design (comprising six crowdfunded judicial review claims), the typology-based case selection, methodological tools, and thematic analytical approach.

Moving into Part Two, which synthesises findings across the case studies to articulate crowdfunding as a multifunctional resource, Chapter Four conceptualises the material resource function of crowdfunding – that is, how crowdfunding money helps facilitate judicial review claims in a largely exclusionary costs and funding environment. The chapter goes beyond highlighting what may seem obvious – that crowdfunds do enable claims – by contextualising crowdfunding within the wider judicial review funding architecture, charting its relationship with costs-capping orders, which appears to be increasingly routine and well-understood across parties to public interest litigation, as well as funding arrangements with claimant lawyers, and legal aid. In view of these observations, and the present hostile landscape for legal mobilisation, crowdfunding is framed as a valuable but, on its own, relatively limited material contribution to accessing judicial review – access to justice here remains highly fraught. Chapter Five analyses crowdfunding's resource contribution according to a broader non-material understanding of 'resource'. Accordingly, it argues crowdfunding offers campaigners – particularly those less experienced in communicating around litigation and building an audience base – opportunities to galvanise their campaign with the interaction of publicity and litigation, which can increase pressure on relevant public authorities and potentially help develop support beyond the individual claim. Crowdfunding can also, in some cases, shape the contours of future campaign action, including through choices around the use of any remaining funds; accumulating cultural resource such as confidence and knowledge, and communicating this to the public; and influencing organisations' internal priorities.

Turning then to Part Three, Chapter Six pivots focus to the inverse of these resource discussions – the resources that litigating, and doing so via crowdfunding, requires of claimants. It discusses the burdens of litigating, including emotional stress related to costs, defence tactics, and dealing with paperwork, before identifying the discrete resource challenges

crowdfunding presents claimants. These include the draining resource and time sink of advertising a crowdfunding appeal, particularly as marketing a justiciable issue can feel uncomfortable and unfamiliar. These burdens occur in view of the inequalities embedded in crowdfunding, which mean that for some litigants, depending for instance on demography and cause popularity, their efforts may produce limited results. Chapter Seven analyses the challenges resulting from the diverging temporalities of the judicial review system, social campaigning, and the crowdfunding process. Judicial review's multi-stage nature does present opportunities to publicise through crowdfunding and media work, but the tight timelines of the early-stage procedure also shape claimants' actions into strict periods. As such, the law's timescales limit and order the character of legal mobilisation processes. The success of crowdfunding is also suggested to be, at times, contingent on external temporalities such as political events and narratives, indicating potential arbitrariness in fundraising success. Finally, it approaches the capacity of the judiciary and state to both delay and quicken claims' progress, expressing the power imbalance facing claimants coming to law. Chapter Eight approaches a further challenge associated with using crowdfunding: campaigners, and donors, may investing hope, and money, with substantive expectations of judicial review that it is not apt to fulfil. Aided by the legal consciousness literature, and its relationship to legal mobilisation and the consciousness of radical actors, it explores how campaigners may have complex orientations to law, with some viewing it as a limited tool of hegemonic force, but which they feel they must use nonetheless. It also evaluates a key site of friction in crowdfunding debates – lay campaigners' and donors' understandings of law. Here, I argue the critics of crowdfunding make an important point – lay publics participating in crowdfunded claims will place hope in the myths which law tells of itself, potentially leading to disappointment. Ensuring expectations are managed is a worthy and important goal. In these ways, Part Three brings together three divergent perspectives on a united theme – the limitations of crowdfunding for judicial review in pursuit of social change, due to the institutional architecture of public law and the power differentials of litigation actors, which delimit the scope of institutionally-accepted action. Finally, Chapter Nine offers concluding reflections on the state of the field, and connects findings to theory.

Chapter Two: A Quantitative Analysis of the Landscape of Judicial Review Crowdfunding

Introduction

The research agenda on crowdfunding is, as Chapter One has indicated, nascent in form, particularly within the UK. In the judicial review context, we might see this as part of a wider scholarly inattentiveness to the doctrine's 'secret history' – its inaccessibility in practice for most people, notwithstanding its doctrinal expansion, by virtue of a high costs risk and limited funding routes,[1] especially following austerity-era legal aid cuts. As indicated, much of the existing research on crowdfunding – and popular media coverage – has focused predominantly on 'public interest litigation', which makes it a phenomenon of interest for legal mobilisation scholars, but also means that the use and suitability of crowdfunding for judicial review litigation beyond this subset has been underexplored.

Accordingly, this chapter provides a much-needed systematic quantitative analysis of crowdfunding in judicial review, constructing a fuller picture of the field through an account of its various actors and the practices often employed. In doing so, it highlights the apparent disconnect between outlying cases raising enormous sums of money, and the more typical, often locally-oriented, cases raising more limited funds. Developing a profile of crowdfunded litigants, it emphasises that crowdfunding is used most frequently in cases which form part of campaigns mobilising to seek or resist broader change, whether national or locally, in contrast to cases concerning purely individual entitlement, which are far less prevalent and gain less traction. It argues that the patterns of crowdfunding activity reveal an underappreciated phenomenon: the mobilisation of law for social goals by groups outside of the 'usual suspects' – that is, relatively well-established and well-resourced national policy organisations. Recognising mobilisation by less traditional social actors, namely inexperienced and local groups, can highlight new questions, and the chapter constructs a typology through which to frame this broadened understanding. This typology, crucially, provides a structured approach to select case studies for the qualitative stage of research.

The chapter begins by explaining the quantitative method employed, before reporting key findings. These include the rate of success in judicial review, the donations made to crowdfunding campaigns, claims' subject matter and the public bodies challenged, whether

[1] Richard Rawlings, 'Modelling Judicial Review' (2008) 61(1) CLP 95, 109.

cases seek effects at the household, local, or national level, and claimants' level of litigation experience. It then discusses implications of the widespread use of crowdfunding in litigation campaigns for social change, and finally explores and categorises the broadened dynamics of legal mobilisation in the dataset by inexperienced and local actors.

Data and methods

First, a brief note on method. Though Chapter Three represents a dedicated methodology chapter, that is focused on the qualitative multiple-case study approach characterising Parts Two and Three of the thesis. The quantitative method here is applicable only to this chapter, and is relatively straightforward, so can be dealt with in less detail. Within socio-legal studies, quantitative study is far less prevalent than qualitative research,[2] although there is of course excellent, and growing, quantitative and systematic work, outlined in Chapter One, mapping the contours of the judicial review field, often using litigation databases. This chapter falls squarely within, and contributes to, that literature and its rallying call to more systematically understand the picture of judicial review. The qualitative method employed here is, in truth, not especially complex, comprising the collection and analysis of descriptive statistics. That said, the data collection process itself was, given the manual labour involved and the difficulty collating information, burdensome and time-consuming.

The data is derived from CrowdJustice. As the only bespoke litigation crowdfunding site in the UK, CrowdJustice has proven by far the most popular site for the practice since its inception in 2014. It is owned by The Justice Platform Ltd, which also trades as Legl, a legal technology company.[3] Some crowdfunded cases use generalist crowdfunding sites like Kickstarter or Crowdfunder, which are not represented in this study. However, this is a limited number compared to those hosted on CrowdJustice, and it would be difficult to systematically identify cases across disparate crowdfunding sites. To locate judicial reviews on CrowdJustice, all fundraising pages within the site's 'Judicial Review' category were identified, and pages which were not labelled as such but which sought funding for judicial reviews were identified manually, by surveying the profiles of all other UK-based cases on the site. In total, 413

[2] Rachel Cahill-O'Callaghan and Linda Mulcahy, 'Where are the numbers? Challenging the barriers to quantitative socio-legal scholarship in the United Kingdom' (2022) 49(S1) J.L.Soc'y S105, S108.

[3] 'Terms of Use' (CrowdJustice) <https://www.crowdjustice.com/terms-and-conditions/>; Legl <https://legl.com/>. All webpages in this chapter last accessed 11 September 2023 unless otherwise stated.

CrowdJustice pages were identified, with a cut-off point in November 2020, representing the vast majority of fundraising pages for judicial review claims hosted on CrowdJustice from its inception to the time of research. Given the lack of clarity and detail in some pages, some judicial review claims may have been missed in the manual search of all cases, but this would nonetheless be a very small number. CrowdJustice may also have removed a small number of pages from the website, for instance where content breaches its terms and conditions.[4] The majority of cases were brought by claimants in England and Wales, with a small number in Scotland and Northern Ireland. Using the information within the 413 CrowdJustice profiles, a database was constructed containing variables including, inter alia, the sums of money sought and raised; cases' progress, subject matter, and the public body challenged; the detail provided on the nature of the case, and the number of updates provided. As some pages lacked transparency, it was sometimes necessary to undertake internet searches to ascertain cases' ultimate progress. This usually clarified the result, but where cases had ceased taking donations, no updates were provided on CrowdJustice, and the internet searches yielded no information, they were assumed to have been abandoned at an early stage. CrowdJustice collects significant volumes of data on the nature of cases on its site, which has not been shared externally. As a private organisation holding valuable information on an important and controversial dynamic of public law litigation, it would be helpful for CrowdJustice to release these data more widely.[5]

The progress of claims

This section outlines how the cases in the dataset progressed through the judicial review system, demonstrating how many claims proceeded to the permission stage, substantive hearing, and appeals, and where positive outcomes were achieved out-of-court. Of the 413 CrowdJustice pages, those which involved ongoing cases at the time were removed. Where multiple crowdfunding pages concerned a single claim, for instance having a second page to

[4] CrowdJustice did remove an Employment Tribunal fundraising appeal by barrister Allison Bailey, due to language relating to transgender people which it judged to breach its terms and conditions. CrowdJustice did, though, allow fundraising to continue on a holding page, to a limit of £60,000: 'Statement from CrowdJustice' (CrowdJustice, 2020) <https://www.crowdjustice.com/case/allison-baileys-case/>.

[5] There is a growing focus on data collection and sharing in access to justice policy, particularly from The Legal Education Foundation: Natalie Byrom, *Digital Justice: HMCTS data strategy and delivering access to justice* (The Legal Education Foundation, 2019).

fundraise an appeal to an initial claim, all pages related to the same case were treated as one, to avoid duplication. As such, there were 330 unique completed cases, which progressed as follows.

Figure 1: the permission stage

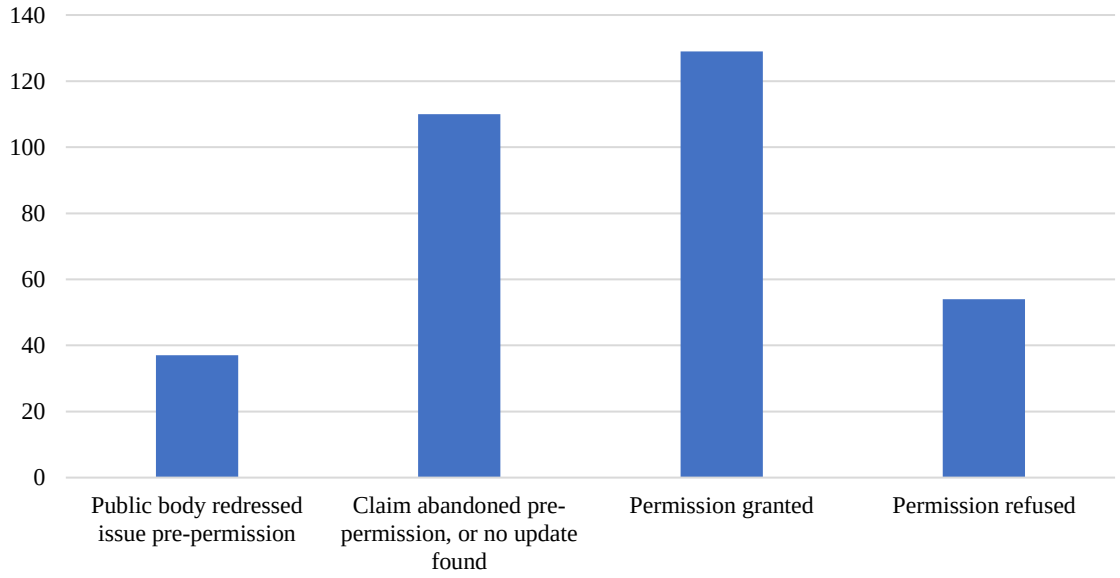


Figure 1 shows the proportion of cases proceeding to the permission stage of judicial review, and the proportion of those cases granted or refused permission. On 37 occasions, claims were resolved in the claimant's favour prior to permission, because public bodies agreed to revisit the issues in response to the legal pressure, meaning the claimants withdrew their claims. This affirms the importance of settlement in judicial review, in redressing grievances while avoiding costly litigation.[6] Yet the rate of cases settled appears relatively low when compared with previous research.[7] This could be due to the subject matter of cases in the CrowdJustice dataset, which is dominated by planning and environment cases where settlement rates have tended to be low compared to the wider caseload.[8] By contrast, as discussed later, areas like homelessness, housing, and asylum, with far higher settlement rates, are underrepresented here.

110 cases were recorded as not proceeding to permission or settling. In some cases, an update was posted on the CrowdJustice page, in the media, or on social media which clarified that the case was withdrawn without a positive outcome, sometimes on lawyers' advice not to

[6] On settlement generally, see Theodore Eisenberg and Charlotte Lanvers, 'What is the Settlement Rate and Why Should We Care?' (2009) 6(1) JELS 111.

[7] See Varda Bondy and Maurice Sunkin, 'Settlement in judicial review proceedings' [2009] PL 237, 245-6.

[8] ibid 246.

proceed given the high costs risk relative to the case's merits. In other cases, no update was posted on the page or in media coverage – following extensive media searches, such cases were recorded as withdrawing without positive outcome. A small number of these cases perhaps settled but were not publicised online, meaning the data may slightly underrepresent the settlement rate. Some may even have reached permission, although as fundraising often ceased at an early stage, this indicates claimants may have used initial funds to gain legal advice which discouraged proceeding.

Concerns have been raised that crowdfunding might encourage meritless litigation, particularly in 'non-investment-based' crowdfunding, where donors lack a financial stake in the case's outcome and so have less incentive to assess its merits.[9] This is the case in judicial review, where monetary remedies are not generally available. We might, then, expect a considerable proportion of crowdfunded claims to be refused permission, since the permission stage is designed to filter out unarguable claims.[10] However, of 183 cases reaching the permission stage, only 54 were refused permission and 129 were granted, whether on the papers or upon renewal. Considered alongside the relatively low settlement rate prior to permission, this may indicate that cases with arguable merit were settled less frequently than ordinarily expected, meaning a higher proportion of arguable cases reached the permission stage than otherwise expected. Again, this may be explained by the dominant subject matter of crowdfunded claims, with planning cases settling rarely, meaning a greater incidence of arguable cases may proceed to and be granted permission. It is also possible that, whereas they might tactically settle with a legally aided claimant to avoid a claim, [11] some public bodies may have underestimated claimants' capacity to crowdfund claims and, expecting claimants to withdraw due to financial pressures, resisted settlement. If so, it is possible that as crowdfunding becomes increasingly prominent as an effective fundraising tool, the incidence of early settlement may increase as public bodies look to avoid costly litigation.

[9] Ronen Perry, 'Crowdfunding Civil Justice' (2018) 59 BC L REV 1357.

[10] See Varda Bondy and Maurice Sunkin, 'Accessing judicial review' [2008] PL 647.

[11] Bondy and Sunkin (n 7), 240.

Figure 2: the first substantive hearing

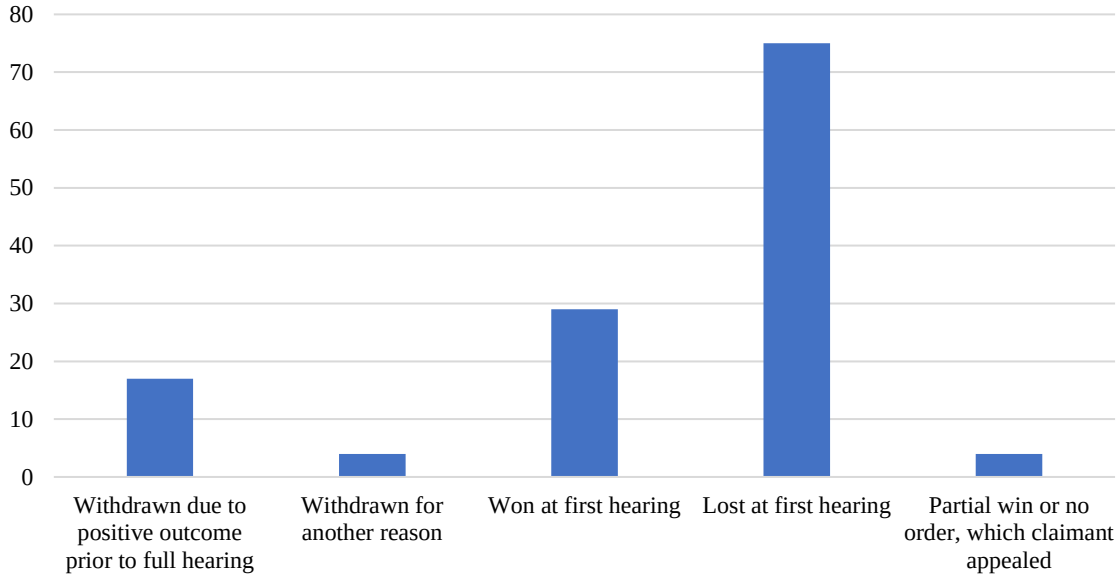


Figure 2 shows the progress of the 129 crowdfunded cases granted permission. 17 were withdrawn due to settlement prior to the substantive judicial review hearing, while four cases were withdrawn before the full hearing for other reasons, for instance the costs risk, representing a negative outcome for the claimants. 108 cases proceeded to a substantive hearing, with the claimant winning in 29 cases at first instance, and losing in 75. In a further four cases, the claimant did not lose in the High Court per se, but appealed a decision – either no order was made, the claimant won on certain grounds but not others, or won but was denied relief. This category is somewhat paradoxical, with some claimants winning but being unsatisfied – since they appealed, it was taken that the outcome was not satisfactory, and they were recorded separately.

Figure 3: the appeals stage

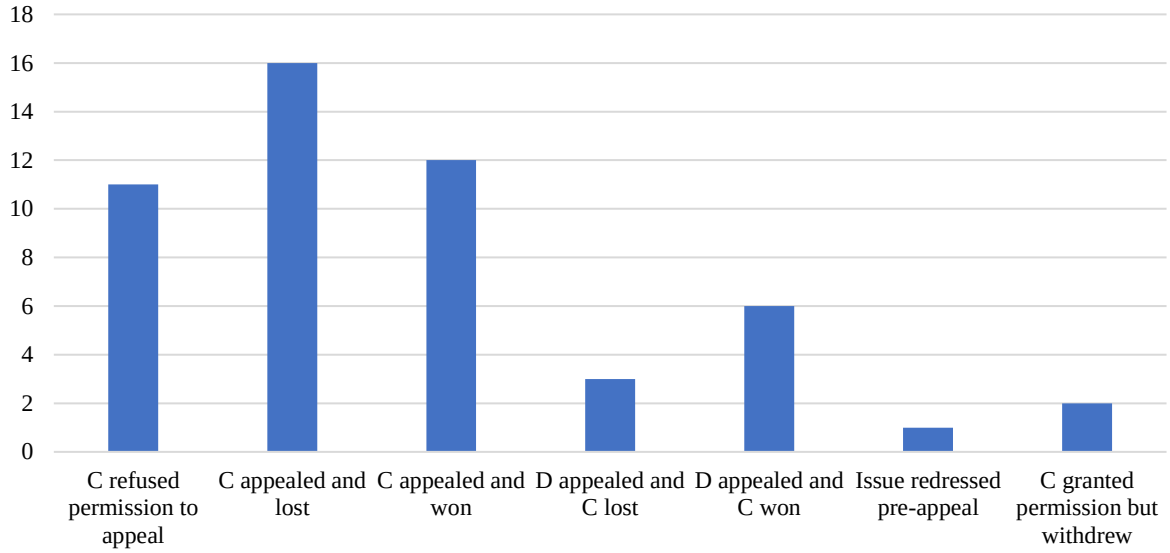


Figure 3 shows the outcomes of the 51 cases which were appealed, whether by the claimant or the defendant. Of the 29 cases which claimants won at first instance, the defendant appealed in nine, and the claimant lost three and won six. 11 claimants who lost at first instance were recorded as being refused permission to appeal. It is also possible that other claimants among the 75 first instances losses sought to appeal and were refused, but this was not publicised. In 31 cases, claimants were granted permission to appeal – winning in 12 cases, losing in 16, and withdrawing in two despite being granted permission, for instance due to costs. In one further case, a claimant was granted permission to appeal a High Court defeat but withdrew after the issue was redressed. City of York Council had granted English Heritage planning permission to construct a visitor centre at the Clifford's Tower landmark. English Heritage withdrew their plans prior to the appeal hearing, recognising their unpopularity, expressed in part through the collective crowdfunding campaign.[12] Of the 29 cases which claimants won at first instance, the public body appealed in nine, with the claimant losing three appeals and winning six.

Of 330 unique completed cases, then, at least 93 saw a positive outcome for the claimant, through settlement or in court. Put another way, 28% of crowdfunded claimants going to law experienced a positive outcome. While comparisons could be made with success rates in the wider judicial review caseload, this is unwise given disparities in recording statistics. Official statistics do not capture the reasons why cases are withdrawn, making it difficult to

[12] Cllr Johnny Hayes MBE, 'Clifford's Tower Visitor Centre Judicial Review' (CrowdJustice, 2016) <https://www.crowdjustice.com/case/cliffords-tower/>.

measure the positive outcomes which claimants regularly achieve pre-action, which this study does account for.[13] Furthermore, given the lack of information in some CrowdJustice pages, it cannot be stated with certainty that all claims in the dataset reached the stage of being issued as applications for judicial review, the basis for official statistics in England and Wales.[14]

Donations

Through analysing the donations made on CrowdJustice, we can begin constructing a picture of the crowdfunding landscape, one beset with inequality. Across all 413 cases, the total sum of money donated was £9,164,971, from 287,882 unique pledges by donors. As such, the mean individual pledge donated was £31.65. The lowest value of donations a case received was £0, on two occasions, while the maximum value was £422,758, in the entrepreneur Simon Dolan's unsuccessful challenge to the Covid-19 lockdown restrictions – this fund was ongoing at the time of research and reached £427,307.[15] The mean value of donations a case received was £22,191, while the median was £8,046, while the mean number of individual pledges a case received was 697, and the median was 187. The difference between the mean and median figures for both the donation values and the number of pledges is striking. This points to the statistical effect of outlying cases, that is, values which differ vastly to the rest of the data. Whereas the calculation of the median value is largely unaffected by outliers, the mean value can be skewed considerably where outliers are present. To test this, all outliers were identified and removed from the dataset through calculating the interquartile range and the lower and upper bounds. Remarkably, 52 cases were identified as outliers which exceeded the upper bound of £47,382.50, comprising 13% of the entire dataset. Excluding these outliers, the mean and median values were far more similar, with the mean value donated £10,209.90 and the median £6,330. Equally, the mean number of pledges was 285 and the median was 145, substantially closer than when accounting for outliers. This starkly demonstrates that, in the levels of fundraising on CrowdJustice, there is a substantial divide between 'typical' cases, that

[13] Mikołaj Barczentewicz, '*Cart* Challenges, Empirical Methods, and Effectiveness of Judicial Review' (2021) 84(6) MLR 1360, 1363. This is a problem acknowledged by the Independent Review of Administrative Law: *Independent Review of Administrative Law*, Report Cm 407 (2021).

[14] Ministry of Justice, *Civil justice statistics quarterly* <https://www.gov.uk/government/collections/civil-justice-statistics-quarterly>.

[15] Simon Dolan, 'Join the Legal Challenge to the UK Govt Lockdown' (CrowdJustice, 2020) <https://www.crowdjustice.com/case/lockdownlegalchallenge/>.

is, those which raise approximately £5,000 to £20,000, and the outliers raising upwards of £50,000. To underscore this fundraising inequality further, the overall sum of money donated when excluding the outliers was £3,685,776 – of the £9,164,971 raised across all 413 cases, 52 cases (13%) were responsible for almost 2/3 of the money raised. The breakdown of funding rates is demonstrated in Figure 4, for all 413 pages, and in Figure 5, for the 361 pages once outliers were excluded.

Figure 4 - Donations (all 413 pages)

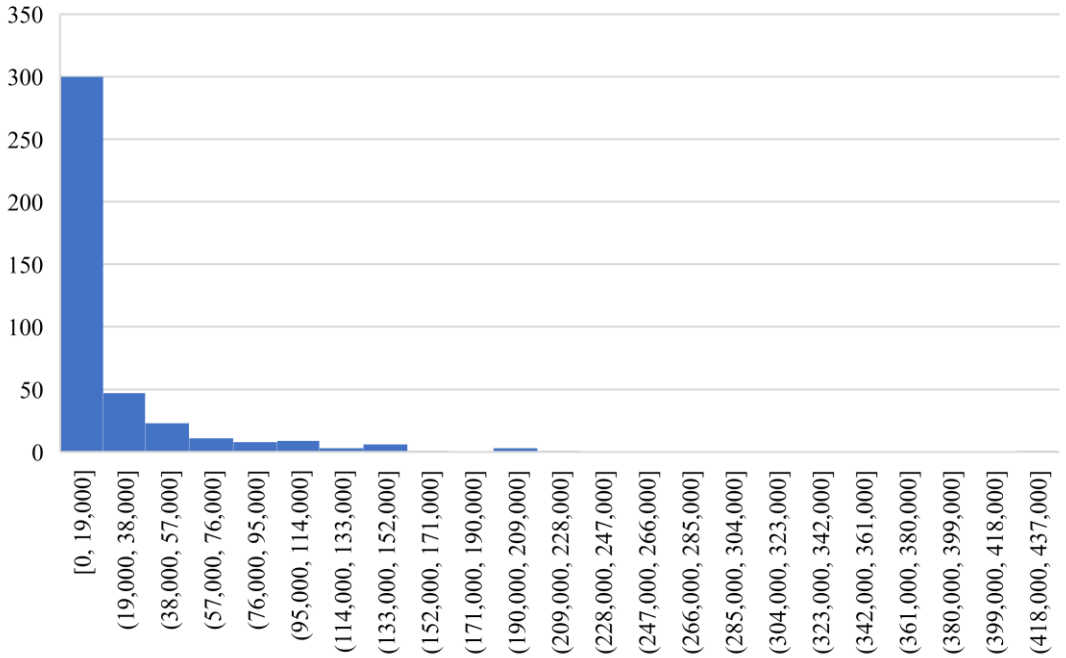
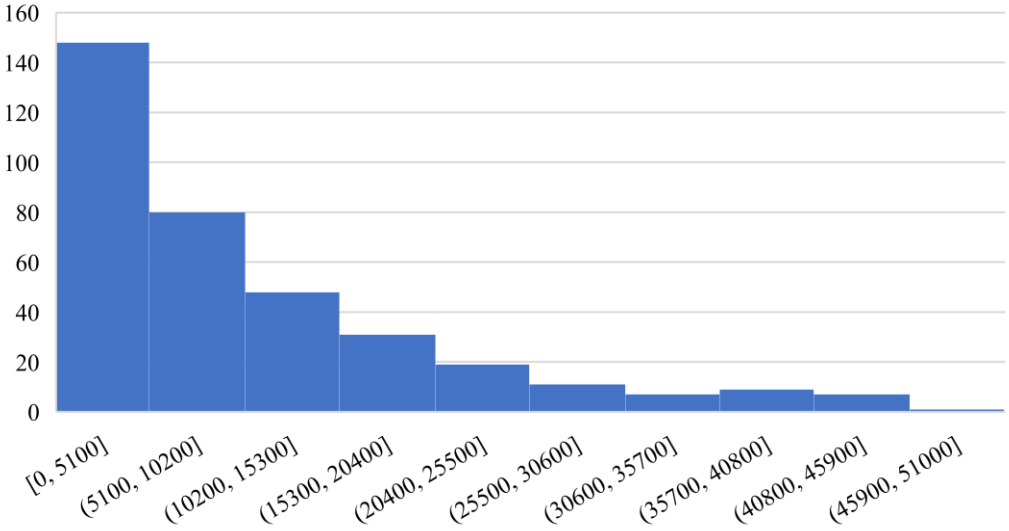


Figure 5 - Donations (with 52 outliers removed)



It is of course inevitable that, in a free market reliant on donors' generosity to pledge money towards access to justice, certain cases will receive substantially higher numbers and

values of pledges than others. This may be affected by the relative pre-existing social capital of those promoting cases, for instance their capacity to mobilise traditional and social media,[16] and the emotiveness or topicality of the issue at stake. Yet much of the public coverage and consciousness around crowdfunding is centred largely on its use in outlying cases, highlighting with either optimism or concern the enormous sums campaign groups can fundraise.[17] This might obscure the reality that, in the vast bulk of 'typical' crowdfunded cases, a funding gap remains. In these cases, claimants may be unable to raise enough to willingly adopt the high costs risk associated with the 'loser pays' rule in civil litigation.

Indeed, several claimants have explained on their fundraising pages that they were abandoning claims due to funding risks. One group raised £17,500 to judicially review the grant of planning permission to demolish and replace a building in London, but withdrew its application days before the permission hearing because the costs risk outweighed the claim's merit.[18] Similarly, a community group challenging council's a decision to sell Hornsey Town Hall to developers raised £14,817 on their second fundraiser – a respectable sum roughly bisecting the dataset's mean and median values – but closed the CrowdJustice page and withdrew the claim the night before the permission hearing, as they had not raised enough to prevent the costs risk falling on individuals.[19] It can also reasonably be assumed that, of the many cases which did not provide an update before ceasing fundraising, a considerable

[16] For discussion of crowdfunding and social capital in other contexts, see e.g. Roel Davidson and Nathaniel Poor, 'The barriers facing artists' use of crowdfunding platforms: Personality, emotional labor, and going to the well one too many times' (2015) 17(2) New Media & Society 289; Rob Gleasure and Lorraine Morgan, 'The pastoral crowd: Exploring self-hosted crowdfunding using activity theory and social capital' (2018) 28(3) Information Systems Journal 489.

[17] See for instance Ruby Lott-Lavigna, ''It Will Be Difficult, but We Have to Try': The Lawyers Fighting for Trans Rights in the UK' *Vice News* (London, 15 December 2020) <https://www.vice.com/en/article/qjp3ab/it-will-be-difficult-but-we-have-to-try-the-lawyers-fighting-for-trans-rights-in-the-uk>; Catherine Baksi, 'Power to the people: the rise of crowdfunding law cases' *The Times* (London, 9 July 2020) <https://www.thetimes.co.uk/article/power-to-the-people-the-rise-of-crowdfunding-law-cases-tsb5k09bh>.

[18] Save Golden Lane Consortium, 'Save Golden Lane' (CrowdJustice, 2017) <https://www.crowdjustice.com/case/save-golden-lane/>.

[19] Hornsey Town Hall Community Interest Company, '#HTHBadDeal – Legal review of the sale of Hornsey Town Hall – *Part 2*' (CrowdJustice 2018) <https://www.crowdjustice.com/case/hthbaddeal-part2/>; the group's first CrowdJustice page can be found at: Hornsey Town Hall Community Interest Company, '#HTHBadDeal – Support a legal review of the sale of Hornsey Town Hall' (CrowdJustice, 2018) <https://www.crowdjustice.com/case/hthbaddeal/>.

proportion were chilled from bringing a claim by the costs risk. Furthermore, as Chapter Four elucidates, many crowdfunded claimants who are relatively successful in fundraising still must often rely on other funding mechanisms to proceed, particularly on their adverse costs being capped, whether through the Aarhus rules in planning and environment cases, or costs-capping orders in non-environmental cases. For instance, a group which raised £20,807 to challenge restrictions on nightlife in Hackney abandoned the claim having been refused a costs-capping order.[20] Costs-capping frequently occurs alongside claimants' lawyers agreeing to act on a conditional fee or pro bono basis, enabling claimants to navigate an expensive landscape.

It is not necessarily surprising or problematic that many crowdfunded claims are withdrawn – on one view, it could be argued to be emblematic of the restrictive costs rules filtering out cases where cost outweighs the merit of proceeding, providing an additional case management filter alongside permission.[21] Nevertheless, it is important to dispel the tempting narrative, perhaps encouraged by the prevalence of outlier cases in the public consciousness, that fundraising is easy for crowdfunded claimants and generates large sums. For the typical claimant, this is far from the case – the financial reality of bringing a claim remains incredibly burdensome and produces significant attrition, which will result in meritorious cases being unable to proceed.

A final point here concerns funding targets. On the front page of its website, CrowdJustice claims that '4 in 5 Hit funding target'. It is important to distinguish a case's 'Target' from its 'Stretch target' – the former is the initial sum a case owner must raise, and if the sum is not met, any funds donated are not kept and donors are not charged. In the judicial review context, this sum is frequently used to gain legal advice on whether a case has merit to proceed, or possibly to fund costs as far as permission. This usually represents a small fraction of the money required to bring a full claim, for which the stretch target is commonly designated. In the dataset, 362 cases met their initial funding 'Target' while 51 did not – 88% met their target. Yet of these 362, only 78 met their 'Stretch target' and 244 did not – 24% of cases met their 'Stretch target'. While many cases could proceed to a full hearing without reaching the

[20] *R (We Love Hackney Ltd) v London Borough of Hackney* [2019] EWHC 1007 (Admin); [2019] LLR 625; We Love Hackney, 'We Love Hackney – defend Hackney nightlife' (CrowdJustice, 2018) <https://www.crowdjustice.com/case/welovehackney/>.

[21] For a similar view, see James Maurici, 'Rethinking Costs in Judicial Review – A Response' (2009) 14(4) JR 388.

stretch target, many others which reached their initial target did not proceed any further or receive sufficient funding to do so.

What kinds of cases are crowdfunded?

Subject matter

The cases within the sample were coded for their subject matter, primarily using the feature on CrowdJustice pages where case owners identify the case's 'Category'. Where they did not identify a category on the page, the main subject was assigned by interpreting the page's content, including in a minority of cases which did not specify a category and which dealt with overlapping areas. Figure 6 shows the topics which were the primary subject matter of 10 or more judicial reviews – subjects with less than 10 cases were aggregated as 'Other' subjects. The breakdown of cases is striking.

Figure 6: subject matter		
Sector	**Number of cases**	**% of dataset**
Environment and planning	146	35
Health and social care	56	14
Education	41	10
Immigration and asylum	30	7
Civil liberties	19	5
Brexit	16	4
Inquest	10	2
Criminal justice	10	2
Other	85	21

146 CrowdJustice pages were primarily related to environmental or planning issues, representing 35% of the dataset, by far the largest subject. 56 pages concerned health and social

care (14%), 41 related to education (10%), and 30 concerned immigration, including asylum (7%). This can be compared to subject matter statistics in the wider judicial review caseload, in Bondy et al's study of 502 judicial review cases between 2010 and 2012,[22] and Bell and Fisher's analysis of decisions of the Administrative Court in 2017, which included 283 judicial reviews.[23] Comparison with both studies is imperfect – both comprise cases reaching a final decision in the Administrative Court, whereas the CrowdJustice dataset includes cases leaving the system at earlier stages. Furthermore, while the timeframe for Bell and Fisher's data is more recent, Bondy et al's study is older and may not capture new developments – it was prior to Brexit, for instance, and both datasets precede Covid-19. Notwithstanding these limitations, certain trends are observable and indicative comparisons can be made. In Bondy et al's study, planning cases accounted for 9% and environmental cases for 0.4%, while, in Bell and Fisher's study, 44 of 283 judicial reviews were planning cases (16%). There is a stark contrast between the overwhelming rate of these pages on CrowdJustice and the comparatively lower rate of cases in those studies. To a lesser extent, this disparity is observable in relation to healthcare. In Bondy et al's data, community care cases comprised 6%, health cases 1.2%, and mental health cases 0.4%. Yet healthcare cases are the second-most common crowdfunded subject matter, with claimants often challenging proposed closures of NHS services by clinical commissioning groups. As discussed below, the high representation of planning and healthcare cases speaks to the types of cases for which crowdfunding has been integral – where groups can bring otherwise inaccessible judicial reviews as part of campaigns to protect local resources. By contrast, immigration and asylum judicial reviews, usually by far the most common subject matter,[24] appear underrepresented among crowdfunded cases, as only the fourth most common subject. This highlights that crowdfunding is less commonly used in challenges by individuals seeking redress for decisions made concerning their entitlements, as discussed below. Furthermore, 16 cases relate to the Brexit process, indicative of the use of

[22] Varda Bondy, Lucinda Platt and Maurice Sunkin, *The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences* (Public Law Project 2015), 11.

[23] Joanna Bell and Elizabeth Fisher, 'Exploring a year of administrative law adjudication in the Administrative Court' [2021] PL 505.

[24] Robert Thomas, 'Mapping immigration judicial review litigation: an empirical legal analysis' [2015] PL 652; Sarah Nason and Maurice Sunkin, 'The Regionalisation of Judicial Review: Constitutional Authority, Access to Justice and Specialisation of Legal Services in Public Law' (2013) 76(2) MLR 223, 239.

crowdfunding to seek government accountability through the courts on politically contentious issues, also seen in the Covid-19 context.

Public body challenged

The trends in subject matter are mirrored in the public bodies which crowdfunded challenges are directed toward. Unlike subject matter, CrowdJustice does not contain a feature specifying the public body challenged, meaning this was deduced from descriptions on fundraising pages and, where applicable, by reference to judgments.

Figure 7: public bodies challenged	
Public body	**Number of cases advertised**
Local councils	136
Home Office	32
Department for Health and Social Care	28
Department for Transport	17
Department for Housing, Communities and Local Government	14
Prime Minister	13
Department for Business, Energy and Industrial Strategy	8
Department for Environment, Food and Rural Affairs	8

As Figure 7 shows, 136 crowdfunding pages directed cases at local councils (33%). This is to be expected, as local authorities typically attract a considerable proportion of claims,[25] and particularly given the high rate of planning claims, typically the remit of local authorities. The individual public body most frequently challenged was the Home Office, appearing as the proposed defendant in 32 crowdfunding pages, followed by the Department for Health and Social Care in 28 cases – a considerable number of which concerned the Covid-

[25] Lucinda Platt et al, 'Mapping the use of judicial review to challenge local authorities in England and Wales' [2007] PL 545.

19 pandemic. Notably, 13 cases challenged the Prime Minister, again indicative of the incidence of crowdfunded cases engaging with issues at the centre of government, for instance the successful claim in *Miller II* declaring Boris Johnson's prorogation of Parliament null.[26]

Locus of effects

It was instructive to categorise the data as to understand the division between cases concerned solely with redressing how a law or policy was applied to an individual decision largely affecting a single household – for instance a decision to deny an individual leave to remain in the country – and cases seeking broader effects impacting people beyond the claimants, that is, 'public interest' or 'strategic litigation'.[27] Yet distinguishing between strategic and non-strategic cases in this way does not adequately account for trends in the crowdfunding data. This is because there is a large propensity of cases brought by local community groups, arguably as part of campaigns to achieve broader goals – for instance, the protection of heritage sites or the environment for future generations, or the maintenance of healthcare provision – but which rarely address novel legal issues, often challenging a defendant's application of a law or policy, for instance around consultation.[28] These cases defy categorisation as definitively strategic or non-strategic

Instead, a categorisation was adopted based on the primary locus of effects – that is, whether the case's potential effects are judged to be focused primarily at the individual household level, such as a leave to remain decision being reconsidered; the local or regional level, such as a grant of planning permission in a protected area being quashed; or the national level, such as central government regulations on social security entitlement being quashed. This approach accounts for local community group litigation better than a binary distinction of 'strategic' and non-strategic litigation, while cases typically regarded as 'strategic' are still differentiated, usually representing cases with a national-level focus.

Adopting this categorisation, 202 cases were recorded as being primarily national in focus, 164 primarily local or regional, and 47 as household-level claims. This distribution

[26] *R (Miller) v The Prime Minister* [2019] UKSC 41; [2020] A.C. 373; for the CrowdJustice page, see Jo Maugham KC, 'Suspending Parliament is the act of a dictator. We can't allow it.' (CrowdJustice, 2019) <https://www.crowdjustice.com/case/dont-suspend-parliament/>.

[27] See for instance Michael Ramsden and Kris Gledhill, 'Defining strategic litigation' (2019) 38(4) CJQ 407.

[28] For discussion of the legal strategies of local community groups in the environmental context, see Carolyn Abbot, 'Losing the local? Public participation and legal expertise in planning law' (2020) 40 LS 269.

demonstrates that crowdfunding is most commonly used for challenges seeking community-oriented effects, whether national or local – cases seeking redress for decisions affecting individual households, such as social security or asylum decisions, are rare. Similar to the discussion on subject matter, this type of case is considerably underrepresented, given that among all judicial reviews, decisions primarily affecting individual households tend to be the most common.[29] There are several possible explanations for this disparity. The most benign, and likely the most common, is that claimants bringing household-level cases regarding issues like social security and immigration are more likely to be granted legal aid, meaning those claimants will need to turn to crowdfunding less frequently. Potentially more concerning is the possibility that, as claimants must promote their case to an audience for funds, this may prove more accessible for those with popular causes attracting public attention and claiming to affect wider society or a locale. Individuals with household-level concerns may have neglected to crowdfund or been advised against it. This accords with concerns raised previously that crowdfunding might become a popularity contest proving less accessible for less popular claimants and causes,[30] especially given the close link between crowdfunding and social media,[31] which both gave rise to the crowdfunding phenomenon and is a crucial site of promotion.[32] The social media presence of individuals navigating the administrative justice system to address their own justiciable problems will tend to be far less significant than that of social campaigners, reducing their relative fundraising capacity.[33] Though most difference is likely explained by access to legal aid, those who do crowdfund for household-level cases often receive low funding rates, sometimes closing the fund without meeting the initial funding

[29] See discussion of 'own fact' litigants in Bondy et al (n 22), 22-4.

[30] Joe Tomlinson, 'Crowdfunding public interest judicial reviews: a risky new resource and the case for a practical ethics' [2019] PL 166, 179.

[31] Evan Hamman, 'Save the Reef: Civic Crowdfunding and Public Interest Environmental Litigation' (2015) 15 QUT L REV 159, 166.

[32] Irma Borst, Christine Moser and Julie Ferguson, 'From friendfunding to crowdfunding: Relevance of relationships, social media, and platform activities to crowdfunding performance' (2018) 20(4) New Media & Society 1396; Rodrigo Davies, *Civic Crowdfunding: Participatory Communities, Entrepreneurs and the Political Economy of Place* (Master of Science Thesis, Massachusetts Institute of Technology 2014), 38.

[33] There may be exceptions, for instance where the individual's case seeking redress for their justiciable problem also operates as a wider test case. See e.g. the *DeSouza* immigrational tribunal appeal: Upper Tribunal (Immigration and Asylum Chamber) *SSHD v Jake Parker DeSouza*, Appeal Number: EA/06667/2016, 14 October 2019. For discussion, see Jo Shaw, *The People in Question: Citizens and Constitutions in Uncertain Times* (Policy Press 2020), 92-94.

target. One individual crowdfunded a claim related to obtaining visas, to ensure his family would avoid deportation and separation abroad, and failed to raise enough to proceed.[34] If claimants already in positions of vulnerability have the lowest chance of constructing a successful crowdfunding campaign, this raises questions as to whether some claimants who are also denied legal aid will fall through the cracks altogether. By contrast, the prevalence of cases with broader goals is considerable, and indicative of the volume of legal mobilisation activity in the dataset.

Litigation experience

The assessment of actors' 'litigation experience' draws upon accounts of resource mobilisation within legal mobilisation research, to distinguish experienced from inexperienced litigants, particularly Galanter's classical typology of 'one-shotters' and 'repeat players',[35] discussed in Chapter One. One-shotter litigants, who have recourse to the law only on occasion, are relatively inexperienced in legal venues and tend to be smaller and less well-resourced units than repeat players. As the legal claim a one-shotter makes is likely to be large relative to their size and resources, they are unlikely to be able to manage it routinely – the stakes are high when they litigate. By contrast, the repeat player anticipates engaging in litigation repeatedly, with resources to pursue more strategic and ongoing litigation campaigns. The outcome of a particular legal claim will therefore likely be smaller and less high stakes relative to their size as an organisational unit and to their resources – notwithstanding that the litigation may be of high stakes more broadly, such as a policy challenge. The repeat player may experience several relative advantages when litigating.[36] They can benefit from economies of scale when building a litigation record, and can develop expertise and readily access legal specialists, including employing in-house staff. Furthermore, their bargaining reputation is more convincing than the one-shotter's, potentially affording greater credibility and power when liaising with and combatting litigation opponents. The repeat player may also conceptualise what is regarded as a favourable outcome differently – while one-shotters are mainly concerned with the case's immediate tangible outcome, repeat players may be more interested in its 'rule component' and

[34] Peter Dipnarine, 'Help my family stay in the UK and fight unfair visa fees' (CrowdJustice, 2017) <https://www.crowdjustice.com/case/fight-against-unfair-visa-fees/>.

[35] Marc Galanter, 'Why the Haves Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9 L.& Soc'y Rev. 95, 97.

[36] Notwithstanding that repeat players still face structural constraints on legal opportunity.

in favourably influencing the outcomes of future cases in the field.[37] There are traditional repeat player litigants operating in the crowdfunding field, either crowdfunding repeatedly or using crowdfunding occasionally and litigating otherwise using other funding streams.

To operationalise a distinction between experienced and inexperienced litigants, actors who have commenced three or more judicial review cases in their campaign work – including cases brought without using crowdfunding – were classified as 'experienced'. This number, it is argued, indicates a more established and strategic approach to litigation. By contrast, to regard actors who have commenced two actions as 'experienced' carries greater risk of over-inclusivity, incorporating actors with disparate, reactive, and less intentional or strategic patterns of legal action. Indeed, when comparing the 11 actors who have commenced two cases to the six who have commenced three actions, the latter were considerably more established and specialised in their use of law. While some organisations which have commenced two cases may be developing an emerging litigation profile, at this time it would appear premature to regard them as 'experienced'.[38] The number of cases claimants have brought was ascertained using BAILII case law records, for cases reaching a full hearing, and internet searches, for cases brought which did not reach a substantive hearing, whether due to settlement, refusal of permission, or another reason.[39] Accordingly, leaving aside the 47 household-level cases, 316 of the 366 remaining crowdfunding pages have been coded as being brought by inexperienced litigants, and 50 by experienced litigants. This represents an important empirical observation interrogated later: the majority of crowdfunded cases using law to pursue collective social aims are brought by inexperienced litigants.

From the variables discussed thus far, we can construct a picture of the types of cases to which crowdfunding is and is not well-suited. Community groups commonly crowdfund cases with local-level effects, often challenging local councils around planning or healthcare. It is also common for groups mobilising law within national-level campaigns for social and legal reform to crowdfund litigation on topical issues, often against central government

[37] Galanter (n 35), 98-102.

[38] A potential example is the Transport Action Network, who in 2023, since the initial coding exercise, are bringing a third judicial review claim.

[39] These searches used the organisation or individual's name alongside keywords such as 'launch/commence', 'judicial review', 'legal case/action'. Campaigners often seek local/national media attention when launching, but a small number of claims may not have been reported online or captured in the search, and so the number of experienced groups may be slightly underreported.

departments. By contrast, there is an underrepresentation of individuals seeking redress for administrative decisions concerning their entitlements, particularly in sectors like immigration and asylum, and social security. The use of crowdfunding appears skewed towards campaigns with a communal element, to a disproportionate degree when compared with the wider judicial review landscape. The availability of crowdfunding appears to have facilitated inexperienced group litigants bringing cases as part of wider campaigns, such that these actors dominate the dataset. This facet of crowdfunding gives rise to concerns explored subsequently.

Judicial review and campaigning

The propensity of crowdfunded cases which form part of broader campaigns seeking social change, and the importance of appealing to audiences, has resulted in case owners frequently framing their CrowdJustice pages as contributing to collective campaigns. It has also arguably provoked tensions for case owners between reporting cases rigorously, acknowledging the realities of the legal system, and mobilising policy campaigns. This tension is apparent in relation to both the descriptions and updates which case owners may provide to donors.

Case owners commonly utilise the requirements of the crowdfunding medium to help promote their causes. Many pages' titles function to enrol prospective donors into a collective campaign to, for instance, preserve a feature valued by a local community, or overturn a government policy deemed oppressive. Language such as 'Join' and 'Help' – used in 16 and 36 pages respectively – convey that prospective donors can actively contribute to a worthwhile cause. Equally, the use in 11 instances of 'No to', such as 'NO to Heathrow. YES to a Safe Climate Future',[40] communicates that participation will help demonstrate to policymakers that the donor base will not tolerate certain actions. Locally-oriented cases frequently appealed to donors to actively help to 'save' local features, and 'stop' their removal. The idea that contributing to a crowdfunding campaign enables donors to feel they are exercising their voice in society has been raised elsewhere,[41] and the present dataset indicates case owners may employ participatory frames to encourage donations. Similarly, 18 page titles included a

[40] Plan B, 'NO to Heathrow. YES to a Safe Climate Future.' (CrowdJustice, 2018) <https://www.crowdjustice.com/case/no-to-heathrow/>.

[41] Hamman (n 31).

hashtag, for instance '#justice4henharriers',[42] and '#NoVoteDenied'.[43] This suggests campaigns attempt to mobilise crowdfunding's relationship with social media, to generate a shareable campaign on multiple online fronts. 27 pages employed language of 'justice', 'just', or 'unjust', across national, local, and household-level cases. These universal frames appeal to collective notions of right and wrong, enabling claimants of any size to associate their particular cause with broader struggles. Crowdfunding is thus framed by case owners, however consciously, as a particularly accessible form of participation in democracy, with a very low barrier to entry, that is, £1.

Quality of descriptions

The relationship of many crowdfunded cases to broader policy campaigns is an inevitable feature of a competitive and finite funding market, and is itself relatively unproblematic – much valuable strategic litigation is brought by campaign groups with a wider policy aim, and this is far from a recent phenomenon.[44] Yet in the crowdfunding context, the data indicate conflicts of interest may at times arise between the need to appeal to donors and to represent the basis of the case with integrity. The primary method for case owners to communicate to donors the nature of their case is writing a case description. Accordingly, the content of the description was analysed across the 413 cases in the dataset. Categories were constructed of 'Facts', 'Policy', and 'Law', and descriptions were judged to provide 'Strong', 'Moderate', or 'Weak' descriptions in relation to each. 'Facts' regards the case's circumstances and what the public body has done, for instance a council proposing to reduce funding for transport for children with SEND. 'Policy' concerns how the case fits into the policy field, such as what problems the case reveals about the public body's conduct, how it relates to the political landscape, or any implications that leaving the conduct unchallenged might have. A case owner might claim that reducing SEND transport funding is emblematic of a council's ongoing discriminatory approach to children with SEND due to a restricted budget. Of course, judicial reviews need not be relevant to the policy landscape, but this is common within descriptions and, in mobilisation terms, can be important in gaining traction among politically engaged lay

[42] Mark Avery, 'Justice for Hen Harriers! #justice4henharriers' (CrowdJustice, 2018) <https://www.crowdjustice.com/case/justice-for-hen-harriers/>.

[43] NEW EUROPEANS, '#NoVoteDenied: Ensure all EU citizens can vote in the UK EU elections' (CrowdJustice, 2019) <https://www.crowdjustice.com/case/novotedenied/>.

[44] Carol Harlow and Richard Rawlings discuss the history of litigation brought by campaign groups: *Pressure Through Law* (Routledge 1992).

audiences. Finally, ‘Law’ concerns the extent to which the description explains the legal grounds, process, and potential remedies, for instance that SEND funding cuts will be challenged under the Equality Act 2010, and that the council’s consultation was inadequate. Whether a description is ‘strong’, ‘moderate’, or ‘weak’ on these matters does not necessarily indicate the case has merit, rather it relates to the volume and precision of the information provided. This coding exercise was undertaken solely by myself, and so the distribution of cases across the categories was not independently verified by another researcher. Accordingly, the discussion pertaining to the strength of descriptions should be viewed in this light and the analysis taken as indicative. Figure 8 demonstrates the cases coded in each category.

Figure 8 – strength of descriptions

	Strong		**Moderate**		**Weak**	
	Number	%	Number	%	Number	%
Facts	153	37	237	57.4	23	5.6
Policy	180	43.6	214	51.8	19	4.6
Law	43	10.4	200	48.4	170	41.2

There is, then, a stark contrast between the coded strength of description in relation to the case facts and the policy dimension, compared to the description provided of legal process or argument, which is far less commonly coded as ‘strong’ and far more commonly as ‘weak’. Indeed, the number of cases providing a ‘weak’ description of law is almost tenfold the cases providing a ‘weak’ policy description, while the number of cases providing a ‘strong’ description of law is less than one quarter that of the cases providing ‘strong’ policy descriptions. The weak detail afforded to law is sometimes inevitable – case owners are raising initial sums for a barrister’s early-stage advice, meaning there may be little information on grounds at that stage. Nevertheless, this coding indicates donors are often persuaded to fund cases based on their relevance to policy and their emotive factual circumstances. Case owners need not especially outline or justify why their case could represent an arguable judicial review claim, where for the most part the lawfulness of the decision-making procedure is subject to review rather than the decision’s substantive merit. This is unsurprising given the aforementioned dynamics of marketing to a crowd – it is understandable to emphasise the

emotive and politically salient features, and the procedural grounds may appear less important for a crowd seeking to participate in bringing about change.

It appears, then, that there may be a tension between providing accounts of a case's legal basis and mobilising a popular campaign. This has arguably contributed to, at times, a disconnect between whether cases have merit and whether they in fact receive funding, which is perhaps emblematic of the arbitrariness associated with market-based legal funding more broadly.[45] This disconnect is most apparent where cases with considerable political salience raise substantial amounts of money, but lack substantive merit. For instance, a page claiming the Coronavirus Act 2020 was 'Null and Void!' raised £79,595 from 3,452 pledges at the time of sampling –[46] and has since reached £114,276 – but was refused permission on the papers,[47] and upon oral renewal.[48] This case highlights a broader problem that donors may fund cases with expectations of how the law will operate and what interests it will protect which are not reflected in practice. The crowdfunding page suggested the claim would seek to repeal the Coronavirus Act itself, and people appear to have donated on that basis, but it did not explain how primary legislation could be overturned.[49]

Given the low profile traditionally afforded to administrative justice relative to criminal, civil, and family justice,[50] public understanding of judicial review's function and procedures may be limited – as discussed in Chapter Eight. Indeed, Nason points to an absence of a 'public law culture' throughout much of the country, with most lay citizens unaware of their administrative law rights.[51] Rarely do case owners – usually themselves lay persons – inform their prospective donors on the operation of judicial review, or the remedy which could

[45] See Frederick Wilmot-Smith, *Equal Justice: Fair Legal Systems in an Unfair World* (Harvard University Press 2019).

[46] The People's Brexit, 'The Coronavirus Act 2020 is Null and Void!' (CrowdJustice, 2020) <https://www.crowdjustice.com/case/the-coronavirus-act-2020/>.

[47] *R (Corbett, Morris, and McCrae) v Secretary of State for Health and Social Care and others* CO/3772/2020.

[48] *R (Morris and McCrae) v Secretary of State for Health and Social Care and others* [2021] EWHC 1497 (Admin).

[49] See Sam Guy, 'Judicial review and Covid-19: reflections on the role of crowdfunding' (Essex Constitutional and Administrative Justice Institute, 5 June 2020) <https://essexcaji.org/2020/06/05/judicial-review-and-covid-19-reflections-on-the-role-of-crowdfunding/>.

[50] Nick O'Brien, 'Administrative Justice: A Libertarian Cinderella in Search of an Egalitarian Prince' (2012) 83(3) PQ 494, 494.

[51] Sarah Nason, *Reconstructing Judicial Review* (Hart Publishing 2016), 127.

reasonably be expected if successful. As such, as McCorkindale and McHarg have warned in relation to litigation around contentious issues like Brexit, and as the above discussion supports, lay donors may crowdfund a case based on political or emotive factors unrelated to merit, without fully understanding what it could achieve or its prospects of success.[52] Harlow and Rawlings argued in 1992 that relaxing judicial review's standing rules risked luring into court laypersons as litigants who would then become 'disenchanted' by the comparatively limited nature of the rest of judicial review proceedings, particularly the technical and procedural grounds for review, which discourage political battles. They feared this would create 'a class of disappointed litigants' whose disillusionment would undermine the authority of the judicial process.[53] Crowdfunding risks the same issue, with some disappointed litigants having accused the judiciary of bias. In the aforementioned Coronavirus Act litigation, the claimants suggested while the case was ongoing that the judiciary were 'pro-British political activist', and, after their renewed application for permission was refused, accused the courts of 'actively preventing this corrupt Government being held to account for their fraudulent 'covid laws'!'[54] Marcus Ball even complained to the Judicial Complaints Commission, alleging bias against two of the judges who refused his private prosecution of Boris Johnson.[55] This issue also arises for donors, lay citizens who may participate in judicial review with the promise of social reform and political accountability. The procedural focus and the nature of the available remedies could fall short of lay expectations of what law can provide, especially where case owners exaggerate their accounts.[56] In some respects, this mirrors Gill and Creutzfeldt's study of the legal consciousness of 'ombuds watchers'.[57] 'Ombuds watchers' are citizens who have made complaints to the ombuds system, expecting justice and, to their shock, experienced an informal, bureaucratised process departing from their preconceptions of more formal judicial justice. In response, they have rejected the legitimacy of the ombuds system and the 'political-

[52] Christopher McCorkindale and Aileen McHarg, 'Litigating Brexit' in Oran Doyle, Aileen McHarg, and Jo Murkens, *The Brexit Challenge for Ireland and the United Kingdom: Constitutions Under Pressure* (CUP 2021), 288.

[53] Harlow and Rawlings (n 44), 307.

[54] The People's Brexit (n 46).

[55] Marcus Ball, 'Marcus J Ball JCIO Complaint Supperstone Rafferty' <http://bitly.ws/o9XM>.

[56] See discussion around the litigation on the state pension for '50s women': Barbara Rich, 'A #BackTo60 Setback' (*Medium*, 16 September 2020) <https://abarbararich.medium.com/a-backto60-setback-634311f526f7>.

[57] Chris Gill and Naomi Creutzfeldt, 'The 'Ombuds Watchers': Collective Dissent and Legal Protest Among Users of Public Services Ombuds' (2018) 27(3) S.&L.S. 367.

legal-bureaucratic establishment', regarding it as 'corrupt by design', and mobilise to resist the ombuds process and seek reform.[58] While judicial review is formalised, citizens who interact with and place hope in the process for the first time via crowdfunding donations may discover that it is not necessarily designed to deliver substantive social changes which some campaigns gesture towards.

Case updates

CrowdJustice enables case owners to provide updates to donors, as the case progresses, on the crowdfunding page, separately from the case description, for instance when meeting funding targets, going to the permission stage, or receiving a judgment. Of the 349 CrowdJustice pages which were completed at the time of sampling, 114 provided no updates on the case's progress whatsoever, while a further 125 gave some updates but did not provide updates to the conclusion of the case. This means that, in 71% of cases, the case owner did not clarify that the case had concluded. As with the strength of case descriptions, maintaining a transparent account of the claim's progress may conflict with constructing a compelling page which mobilises support. If a group crowdfunds litigation as part of a campaign and receives a setback, it might fear that reporting the setback could dampen mobilisation more broadly outside of the crowdfunding context. Such conduct would appear dishonest and to lack transparency, failing to update donors on how their money has been used – McCorkindale and McHarg suggest transparency issues would undermine crowdfunding's democratising impact.[59] Case owners arguably have an ethical responsibility to update their donors on the page itself, especially since, understandably, they do not receive donors' contact details from CrowdJustice, meaning the page represents an important and accessible information hub.

This again highlights the potential incongruity of marketing a case to prospective donors and the ethical responsibilities to report that case transparently, including acknowledging unfavourable outcomes. These concerns are rooted in the recognition of patterns of litigation activity from a remarkably wide range of social campaigners. With the profile of social litigant potentially expanding, it is important to account, within conceptualisations of legal mobilisation, for claimants who do not conform to the conventional image of experienced repeat player public interest litigants.

[58] ibid 380.

[59] McCorkindale and McHarg (n 52), 288.

Who brings crowdfunded cases?

Using the dataset, and informed by the observations above, we can construct a typology of the actors mobilising law via crowdfunding, for the purposes of systematically selecting cases for the thesis' qualitative case study research. In light of the emphasis on social reform within discourse around litigation crowdfunding, and given the somewhat anaemic theoretical understanding of the crowdfunding phenomenon at present, the legal mobilisation scholarship represents an appropriate field through which to frame the use of case studies, as discussed in Chapter One. The research explores the legal mobilisation processes across the full lifecycle of each case, including the roles crowdfunding plays within those processes, across diverse case studies. Core variables must therefore be identified to create a workable typology that informs the selection of appropriate case studies that illuminate experiences of legal mobilisation among claimants with distinct characteristics each seeking social goals through law, satisfying the core research question. Accordingly, variables were thus identified from the quantitative research which were potentially capable of use as case selection categories and of theoretical interest to the core focus on legal mobilisation by a range of social actors. These variables included litigation experience, the size or type of claimant, the level of funding, the defendant public body challenged, and the locus of effects. Other variables such as cases' subject matter were considered but deemed incapable of being operationalised as categories enabling systematic sampling of case studies, given the diverse subject matters for which crowdfunding campaigns have been utilised. The key variables ultimately chosen to guide selection were campaign groups' litigation experience, and their locus of effects. These decisions are justified subsequently, based primarily on their rightness of fit and value to the legal mobilisation field and to the study's research question and aims.

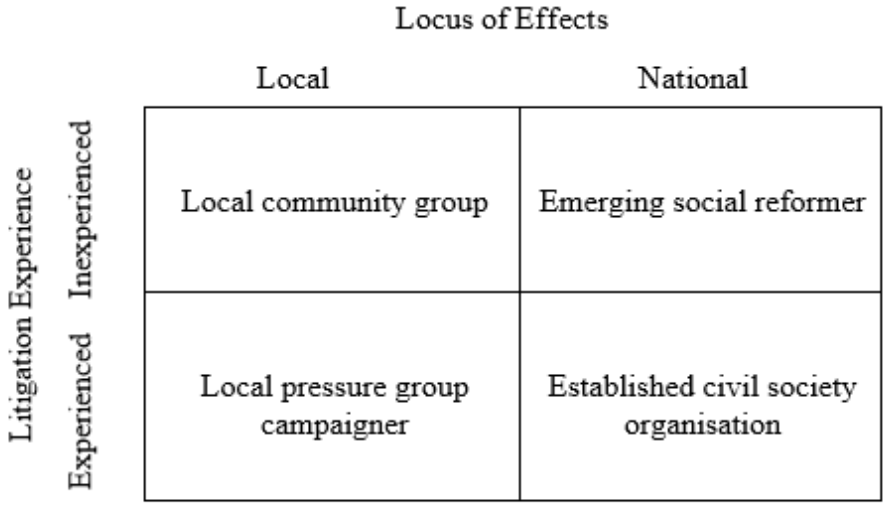


Figure 9: typology of crowdfunded claimants

Expanding the gaze of legal mobilisation

A core empirical puzzle of the CrowdJustice dataset has been the considerable presence of legal mobilisation activity by inexperienced and local groups, especially relative to their representation in discussions of legal mobilisation. Even leaving aside those 47 cases concerning only the claimant's own household, most crowdfunded cases were coded as being brought by inexperienced litigants – 316 of 366 remaining cases. Experienced litigants, such as NGOs, may have greater access to alternative funding sources, including charitable funding and regular membership income. Many cases brought by inexperienced litigants involve social actors choosing to invoke law in pursuit of wider goals within ongoing efforts having otherwise sought those goals through non-litigious means. Even on a conception of legal mobilisation squarely concerned with litigating to achieve broader social purposes, then, much crowdfunded activity is from inexperienced litigants. These litigants must navigate the substantive and procedural opportunity structures, and internal resource constraints – likely even more pressing than for civil society NGOs. Aspinwall notes that assumptions about mobilisation are shaped substantially by studying civil society organisations with material resources sufficient to facilitate acting as powerful public interest litigators, yet these assumptions do not always hold.[60] That legal mobilisation is often intuitively framed primarily as the use of law to pursue social change by well-established repeat player organisations is understandable. These organisations have greater capacity to litigate strategically, looking beyond the specific case's

[60] Mark Aspinwall, 'Legal mobilization without resources? How civil society organizations generate and share alternative resources in vulnerable communities' (2021) 48(2) J.L.Soc'y 202, 203.

tangible outcome, and are typically the core actors able to mobilise law in social movements. Meanwhile, discussions which draw attention to 'public interest' or 'strategic' litigation may exacerbate this by implicitly demarcating 'strategic' from 'non-strategic' and self-interested cases. These discussions are useful for understanding civil society litigation patterns, but the legal mobilisation of less established groups without strategic profiles should not be overlooked – as the trends in the CrowdJustice dataset forcefully demonstrate. To adequately capture the place of crowdfunding in litigation pursuing social change, then, legal mobilisation research must account for actors who do not conform to the dominant perception of experienced civil society litigants.

Indeed, crowdfunding is arguably already contributing to broader patterns in legal mobilisation in this regard. In their study of Brexit litigation, McCorkindale and McHarg argue not only that the level of strategic litigation around Brexit was unprecedented for a single issue within a short time period, but that, in contrast to the notion that strategic litigation is coordinated to achieve clearly defined objectives, this litigation was unusually reactive, opportunistic, and brought by various parties with diverse motivations.[61] They present courts' increasing receptiveness to strategic litigation as one reason for this unusual pattern of 'hyper-litigation', and regard the emergent availability of crowdfunding as a key factor here. Crucially, they note that this pattern, and the factors underpinning it, has spilled into other contexts such as Covid-19.[62] Crowdfunding, then, can clearly shape and mediate the volume and nature of access to courts for socio-political litigation, and this chapter's findings, alongside McCorkindale and McHarg's study, firmly indicate that its effect is to encourage the use of law for social change by scattered and diverse actors with less ongoing strategic profiles. This echoes Tomlinson's suggestion that crowdfunding may dislodge the relatively stable and 'closed' model of conduct in 'public interest' litigation, wherein a limited number of organisations bring repeat actions, towards a model more 'open' to diverse actors. While this democratises and diversifies the voices capable of accessing public interest judicial review, these new voices may lack the well-honed litigation practice of traditional repeat litigants.[63] To some extent, claimants' inexperience could be mitigated as many engage experienced repeat player law firms such as Bindmans LLP, Leigh Day, and Irwin Mitchell, mirroring Harlow and Rawlings's observations in relation to disaster action coalitions supported by repeat player

[61] McCorkindale and McHarg (n 52), 260.

[62] McCorkindale and McHarg (n 52), 287, 290.

[63] Joe Tomlinson, *Justice in the Digital State* (Policy Press 2019), 32-33.

'disaster lawyers'.[64] Crowdfunding's availability has, seemingly, expanded the role of inexperienced actors in legal mobilisation, eroding to some extent the differential resource capacity between inexperienced and experienced litigants (although this relationship is not unproblematic). Irrespective of whether it has in definitive terms caused this changing shape of legal mobilisation, it has certainly increased the visibility of litigation as a potentially accessible strategy for inexperienced groups. Equally, as Chapter Four discusses, some instances of government and judicial pushback against public interest litigation in recent years are perceived to have partly been responses to polycentric crowdfunded litigation. These developments suggest crowdfunding's operation, and its effect on the types of litigants mobilising law, could have significant influence in shaping legal opportunity not only in facilitating, but potentially encouraging a reactive constraining of, access to judicial review.[65] Given the traditional lack of focus on inexperienced actors, it is important to account for this dynamic. Litigation experience is, therefore, a theoretically relevant variable in the typology for a study of crowdfunded legal mobilisation, particularly in light of the existing disadvantages typically facing inexperienced litigants compared to experienced actors.

Equally, the locus of effects has considerable implications for legal mobilisation research. As with its focus on repeat players, legal mobilisation research has understandably prioritised organisations litigating to seek reform primarily at the (supra-)national level, although not exclusively so. Local campaigns receive far less attention, perhaps as they tend to be less 'strategic' in nature and may attach greater emphasis on the immediate tangible impacts of a decision to the local community than longer-term indirect gains. That said, there have been studies of legal mobilisation at a local or subnational level,[66] and others which account for local community groups' contributions toward wider movements, particularly in the environmental

[64] Harlow and Rawlings (n 44), 121.

[65] Sam Guy, 'Access to justice on the market: An empirical case study on the dynamics of crowdfunding judicial reviews' [2021] PL 678, 687.

[66] See for instance Alba Ruibal, 'Federalism and Subnational Legal Mobilization: Feminist Litigation Strategies in Salta, Argentina' (2018) 52(4) L.& Soc'y Rev 928; Vitor M Dias et al, 'Grassroots mobilization in Brazil's urban Amazon: Global investments, persistent floods, and local resistance across political and legal arenas' (2021) 146 World Development 105572; Xiangyi Rena and Lili Liu, 'Building Consensus: Support Structure and the Frames of Environmental Legal Mobilization in China' (2020) 29(121) Journal of Contemporary China 109.

sector.[67] Furthermore, looking to fields related to legal mobilisation, local community campaigns feature more prominently, being acknowledged in other scholarship on law and social change,[68] and being well-recognised in social movement studies more broadly.[69] Ultimately, the crowdfunding dataset provides numerous examples of cases forming part of ongoing locally-oriented campaigns seeking collective extra-legal goals. These campaigns warrant study as uses of law in service of social causes, though focused for the most part on smaller geographic units than the national policy landscape. Indeed, local campaigns can resonate with and draw upon national or global movements, and local actions can contribute to those movements.[70] The 'think global act local' slogan, for instance, connects a worldwide attempt to combat climate change with action at a personal and local level,[71] and one CrowdJustice page within the sample employed this slogan in its title.[72] Equally, campaigns predominantly focused on local matters may be transformed into national-level campaigns, as has been observed in wider social movement studies.[73]

As Lehoucq and Taylor note, the legal mobilisation literature cannot simply be reduced to considering mobilisation by social movements as strictly defined, but incorporates other collective actors who, even if not appropriately categorised as social movements, have mobilised law for social goals, just as they can engage in collective political struggle.[74] Just as

[67] Lisa Vanhala, 'Civil Society Organisations and the Aarhus Convention in Court: Judicialisation From Below in Scotland?' (2013) 49(3) Representation 309; Lisa Vanhala, 'Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK' (2012) 46 L.& Soc'y Rev 523, 543.

[68] See for instance Jennifer Gordon, 'Concluding Essay: The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change' (2007) 95(5) California Law Review 2133.

[69] Pierre Monforte, *Europeanizing Contention: The Protest against 'Fortress Europe' in France and Germany* (Berghahn 2014), 14.

[70] For how local campaigns may draw on multi-scalar frames, see Chris Hilson, 'Framing Fracking: Which Frames Are Heard in English Planning and Environmental Policy and Practice?' (2015) 27(2) JEL 177.

[71] See Sheila Jasanoff, 'A new climate for society' (2010) 27(2-3) Theory, Culture & Society 233, 241; Patrick Devine-Wright, 'Think global, act local? The relevance of place attachments and place identities in a climate changed world' (2013) 23 Global Environmental Change 61.

[72] Matthew Dunne, 'Think Global, Act Local: Fight Fossil Fuel Power Generation in Exmouth' (CrowdJustice, 2020) <https://www.crowdjustice.com/case/exmouth/>.

[73] Monforte (n 69) 14-15.

[74] Emilio Lehoucq and Whitney K Taylor, 'Conceptualizing Legal Mobilisation: How Should We Understand the Deployment of Legal Strategies?' (2020) 45 L.& Soc.Inquiry 166, 169.

local groups can participate in political struggle,[75] then, so too can they mobilise law in pursuit of social goals – irrespective of whether the campaigns are appropriately regarded as (part of) a social movement. Lehoucq and Taylor argue a clear divide between 'self-interested' claims and 'political' claims may no longer be viable – even a claimant initiating a claim in self-interest may develop more political goals with consequences beyond the specific dispute, and claims can be regarded as political mobilisation even if the actors do not frame them as such.[76] Therefore, even when maintaining a focus on litigation to effect social change, as here, this can clearly arise from actors beyond those commonly focused upon. For many local crowdfunded campaigns, litigation is brought seeking to directly affect wider contexts and people not named in the dispute – the local communities or environments, at the very least. This would transcend a purely individual and particularistic focus and be appropriately regarded as sitting along a spectrum of legal mobilisation motivated by social change. Similarly, discussion of the locus of effects may have significance in deepening understandings of legal mobilisation. Specifically, it can build upon the implications of Chris Hilson's study of the anti-nuclear movement. Hilson discusses the movement's use of law in particular local contexts, that is, areas around specific nuclear sites, and the tensions between local and global framings of the issues in the movement's legal strategies. He argues, ultimately, that space and place matter to law's use in social movements – that '[g]eography is, in other words, crucial to legal mobilization.'[77] Incorporating local campaigns more explicitly into a legal mobilisation research design, as the present typology facilitates, can begin to engage with this concept and aid understandings of these processes. We might predict that the role of framing – and scalar framing – could prove salient in local group mobilisation which involves marketing to a crowd that may extend beyond the geographic area to which the legal challenge most directly relates. As such, the phenomena under study in the thesis offer an ideal context in which to explore Hilson's important observations, which have yet to receive sufficient engagement in legal mobilisation research.

[75] E.g. Christopher Rootes, 'Acting locally: The character, contexts and significance of local environmental mobilisations' (2007) 16(5) Environmental Politics 722; Matthew Ogilvie and Christopher Rootes, 'The impact of local campaigns against wind energy developments' (2015) 24(6) Environmental Politics 874.

[76] Lehoucq and Taylor (n 74) 174.

[77] Chris Hilson, 'Framing the Local and the Global in the Anti-nuclear Movement: Law and the Politics of Place' (2009) 36(1) J.L.Soc'y 94, 109.

As with inexperienced litigants, to exclude local campaigns from study risks missing a vital site of crowdfunded mobilisation, with unique implications for addressing the research question and generating theory, especially as these cases are so prevalent within the dataset. There is a parallel here with Bouwer's argument that understandings of climate change litigation ought to embrace greater breadth and complexity, to account for local and smaller scale litigation, both because these cases can have broader social effects, and because climate change requires multi-level responses, including local ones.[78] Local campaigns have much to offer understandings of multi-scalar mobilisation, and should be accounted for accordingly. The selection of both variables – litigation experience and locus of effects – has thus been informed by the discord between conventional accounts of legal mobilisation, often focused on national repeat players, and the observable empirical nature of mobilisation within the database. To adequately understand crowdfunding's role in legal mobilisation, we must thus engage this quandary and understand the prevalence of mobilisation among these types of actors, who are rarely explicitly accounted for. By structuring case selection accordingly, experiences across each dichotomy – litigation experience and geographic locus – can be systematically incorporated, and understudied actors placed alongside repeat players and national groups. This selection strategy offers potentially rich knowledge generation for legal mobilisation scholarship, exploring crowdfunding's relationship to existing theoretical understandings around resource mobilisation and opportunity structures – whether broadening or reinforcing the types of actors capable of accessing law for social ends.

The distinction between local and national cases does exclude the 47 cases coded as seeking household-level effects. This is because this class of claims, primarily concerned with redress for decisions affecting the individual taking the judicial review, may align less easily with the approach to legal mobilisation advanced here, looking to litigation in pursuit of collective goals. Even when considering the nuances of litigants potentially adopting broader motives along the litigation cycle, the household-level cases appear less likely to move beyond self-interest towards broader collective aims than the local and national cases, rendering them less relevant for addressing the core research question.

Thus far, the selected variables have been justified based on their potentially important implications for the research field at large. Crucially, they also align ideally with the core interests driving the research question and design. The study has been influenced by an

[78] Kim Bouwer, 'The Unsexy Future of Climate Change Litigation' (2018) 30(3) JEL 483, 486, 499.

interpretivist understanding of legal mobilisation most famously employed by Michael McCann, which encourages a decentring of courts to direct greater focus towards the agency, experiences, and perspectives of campaign actors from the 'bottom-up'.[79] This is reflected in the core research question, which prioritises the 'experiences of legal mobilisation by social reform actors', and the research design's focus on capturing phenomena in-depth through qualitative methods, primarily interviews, in service of six rich, illustrative case studies. Accordingly, the variables dictating case selection ought to align with this core interest in the identities, experiences, and characteristics of mobilisation actors, such that the methodological design follows naturally from and remains closely linked to the core research aims. While the population from which case studies are sampled is cases advertised on CrowdJustice, the selection choices are based on features central to the identity of the groups themselves, rather than information about the disputes such as their subject matter, outcomes, or sums of money raised. An identity-focused approach can facilitate an understanding of how different actors' identities might influence their legal mobilisation processes, for instance creating distinct barriers or opportunities or influencing how they understand those opportunities. It is suggested that groups' resources and experience, and their locus of effects, can play a core role in how they present themselves and how they are regarded and treated by other actors including the state, the media, and the public. A group might, for instance, make claims to legitimacy by virtue of being experienced (in legal venues) or nationally regarded voices. Equally, a group's claim to authentically speak for a certain population may be presented through a lens of being 'grassroots' or locally-oriented. Prevailing understandings of law and social movements indicate experienced litigants would likely have greater capacity than inexperienced actors, and national groups greater capacity than local groups, to draw on legal and financial resources, and to communicate and frame litigation issues to the public. These disparities in experience and scale could affect legal mobilisation but are themselves potentially affected by crowdfunding, and so are ideal variables to structure case selection to explore crowdfunding's role in legal mobilisation.

It is also argued that the other potential variables identified from the database are less well-suited to structuring case selection. For instance, the nature of the defendant public body challenged in the judicial review was identified as a potential variable, and would ensure structured variation in selecting cases challenging a variety of bodies across, for instance,

[79] Michael W McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (University of Chicago Press 1994).

central government, local authorities, and non-departmental public bodies. Yet this does not align with the aforementioned research focus on the identity of those mobilising law, and the locus of effects and litigation experience more meaningfully pertain to a campaign group's core characteristics. In any event, the variation this variable would provide is arguably also captured by the locus of effects – a claim directed at a local council is more likely to be locally-oriented and one directed at central government to be nationally-oriented. Alongside its superior theoretical value, then, the locus of effects also accounts for similar interests. The rate of funding and pledges was also considered, but dismissed. Funding may ultimately tell us little about the nature of the group itself, as fundraising success may be arbitrary or unpredictable due to market forces. For instance, Liberty raised £460 in a crowdfunding appeal related to the Legal Aid Agency approach to challenging Public Space Protection Orders,[80] and almost £65,000 in a challenge to the Investigatory Powers Act 2016.[81] While an extreme example, this indicates funding rates may not provide a reliable method to systematically categorise and understand the groups bringing cases, in a volatile fundraising landscape.

One variable of potentially greater utility for sampling was the type or size of claimant – whether they are, for instance, an individual, a small group, or a larger and more established group. This would enable the study of groups with differing levels of existing resource, as individuals and smaller groups may tend to have less financial and legal resource than larger or more established groups. This is notwithstanding the presence of individual campaigners with access to considerable existing resource, such as Simon Dolan, who according to his website has a net worth of £200 million.[82] Organisational resource and the type of organisation are of key interest to legal mobilisation scholarship, constituting a core variable offering one explanation of decisions to use law, as Chapter One outlined. However, the litigation experience variable draws attention more overtly to organisational resources for legal strategies than the size or type of group, as indicated by its central role in legal mobilisation scholarship since Galanter's foundational typology in 1974. There is also a resource dimension embedded in the distinction between local and national groups, with Abbot noting local community

[80] Liberty and the Civil Liberties Trust, 'Force Legal Aid Agency to help residents fight council abuse of power' (CrowdJustice, 2018) <https://www.crowdjustice.com/case/laa-pspo/>.

[81] Liberty & The Civil Liberties Trust, 'The People vs the Snoopers' Charter' (CrowdJustice, 2017) <https://www.crowdjustice.com/case/snoopers-charter/>; Liberty & The Civil Liberties Trust, 'The People vs the Snoopers' Charter: Part II' (CrowdJustice, 2018) <https://www.crowdjustice.com/case/snooperscharterpart2/>.

[82] Simon Dolan <https://www.simon-dolan.com/>.

groups tend to be more resource-poor and legally inexperienced than more organised interest groups.[83] As such, what theoretically important implications this variable could provide – in systematically differentiating campaign groups of varying levels of resource – are accounted for by the two variables ultimately selected, which also possess unique theoretical value. The size and type of group, then, is to an extent subsumed into the two chosen variables – we might expect larger and more established groups to be nationally-focused and perhaps more likely to be experienced litigants.

It was also important, though, to ensure that this choice did not give rise to a risk (however small) of case selection which is inadvertently related to case outcomes – that is, to ensure the variables do not have a clear relationship with whether a case is ultimately successful. Epstein and King argue that, as researchers who are conducting small-*n* studies such as case studies tend to select cases by intentional choice rather than random selection, they must guard against inadvertently introducing biases in case selection. This risk can be mitigated by designing a selection rule unrelated to the dependent variable.[84] Here, it is not apparent how the locus of effects or level of litigation experience would be connected to, for instance, litigation success. Regardless, this research does not seek generalisable causal connections related to a dependent variable like case outcomes, as it is most interested in processes, not outcomes.

In sum, it is argued that the two variables selected are the most theoretically useful variables, among those collected in the database, for selecting cases to inform mobilisation experiences. This is due to their relationship to core variables in legal mobilisation scholarship such as resource mobilisation, and their implications for expanding research to more fully understand the role of often-overlooked social actors alongside more traditional social movement organisations.

The typology of legal mobilisation actors

The chapter now outlines each quadrant within the typology of legal mobilisation activity, and indicates core features of each based on data collected within this chapter's quantitative research.

[83] Abbot (n 28), 272.

[84] Lee Epstein and Gary King, 'The Rules of Inference' (2002) 69(1) U.Chi.L.Rev. 1, 113.

i) The local community group – local inexperienced litigants. As disparate and unpredictable as the crowdfunding field is, this category could be argued to contain the 'typical' crowdfunded case. Claimants here tend to be active members of local communities, often campaigning to preserve communal resources. Cases primarily focus on local or regional level effects, although campaigns may appeal to frames with a national appeal such as the marketisation of healthcare or climate change, and conservation issues may resonate with a broader audience particularly where the area is of national interest.[85] The crowdfunding appeals often form part of wider extra-legal campaigns challenging the relevant issue – communities may have mobilised initially to oppose the decision at earlier stages, such as responding to consultations, appearing at planning hearings, or protesting. Yet while the broader campaign may be ongoing before and after the judicial review, claimants are legally inexperienced and unlikely to crowdfund for litigation repeatedly. These features align with Abbott's discussion of local environmental community groups in the context of ex ante participation in the planning system. Such groups, she observes, 'rely heavily on voluntary action' and tend to be less professionalised than organised interest groups; they are resource-poor one-shotters and 'have-nots', whereas opponents such as developers are often repeat players with access to financial and legal resources.[86] She identifies crowdfunding as a mechanism increasingly used to access legal expertise and go some length to levelling this playing field.[87]

Of the 413 cases sampled, 163 satisfy the criteria for this category, and these pages raised a total of £1,417,687 from 32,227 pledges. As such, the average value of each pledge is £43.99. The mean sum raised per case was £8,697.47 and the median was £5,375, with a mean number of 198 pledges per case, and a median number of 116 per case. The mean and median are notably closer together than for all 413 cases. This is due to the lack of outlying cases within this category – of the 52 cases calculated as outliers across the entire dataset, only one was attributed to this category, a challenge related to the regulation of traffic in the Lake District which raised £89,166.[88] Funding therefore generally clusters around the average figures. This

[85] See for instance Goodwin Sands SOS, 'Help us protect the Goodwin Sands from destruction by dredging' (CrowdJustice, 2018) <https://www.crowdjustice.com/case/help-us-save-the-goodwin-sands/>.

[86] Abbott (n 28), 272-3.

[87] Abbott (n 28), 283.

[88] Green Lanes Environmental Action Movement, 'Stop 4x4s and motorbikes ruining the beauty of the Lake District' (CrowdJustice, 2019) <https://www.crowdjustice.com/case/green-lanes-environmental-action/>. One of the case studies selected for qualitative research, Croyde Area Residents Association, also ultimately raised an

is dependent of course on success in mobilising support, and on market factors – some pages will raise far above and some far below the average – but these campaigns often have at least local support providing a moderate base of funding from which to build.[89] Turning to subject matter, this category is unsurprisingly dominated by environment and planning cases, representing 111 of 163 pages. These often concern challenges to grants of planning permission by local councils for developments feared to disrupt the local natural or built environment, sometimes disrupting protected areas. This is followed by 20 cases concerning education, and 16 relating to health. It is also not surprising to find a diverse range of defendant public bodies – mostly local authorities – in this category. Most common was Haringey Borough Council, featuring in six CrowdJustice pages, followed by Shropshire County Council in five, Hounslow Borough Council and Ealing Borough Council each in four, and Ofsted in three.

ii) The local pressure group campaigner – local experienced litigants. In sharp contrast to the category above, this category is almost entirely absent from the dataset, if not completely absent. This is perhaps because community groups that have taken a judicial review concerning their local area have not yet needed to take another claim since then. It is certainly possible that, encouraged by their initial experience and having crowdfunded successfully once, some local groups would litigate again in future, if seeking to resist further unwelcome decisions or push for positive change in the area. Arguably, one claimant group might fall within this category, namely SAVE Britain's Heritage, a conservation organisation campaigning to preserve historic buildings,[90] and which has litigated repeatedly to that effect. The organisation is a national voice in the heritage sector, but its legal actions are brought in relation to specific buildings and might be said to concern primarily local effects. The organisation crowdfunded one judicial review challenging the Secretary of State for Communities and Local Government's refusal to 'call in' a planning application relating to the Paddington Cube development.[91] The case raised £2,835 from 72 pledges.

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outlying amount, however this was ongoing at the time of sampling and did not meet the outlying threshold at that point.

[89] Borst, Moser and Ferguson (n 32) discuss the relationships crowdfunding users have with known persons ('strong' and 'weak' tie relationships) and with unknown persons ('latent' tie relationships).

[90] 'About Us' (SAVE Britain's Heritage) <https://savebritainsheritage.org.uk/about-us/contact-us>.

[91] SAVE Britain's Heritage, 'Stop the Paddington Cube – SAVE appeals for judicial review costs' (CrowdJustice, 2017) <https://www.crowdjustice.com/case/stop-the-paddington-cube/>.

iii) The emerging social reformer – national inexperienced litigants. This category incorporates a diverse range of groups and individuals across various policy fields, accounting for 153 cases in the database. These cases raised a sum of £5,384,855 – almost four times the sum in the local community group category despite containing 10 fewer cases. A considerable proportion of the outlying cases raising the largest sums are within this category. The total number of pledges was 172,970, with the average pledge value totalling £31.13, around £10 lower per donation than for local community groups. It is possible that citizens are more inclined to donate a higher value to an issue they are locally affected by, whereas broader national causes may be of less direct concern and donations may be more purely altruistic.

Although their broader policy campaigns may be reasonably well-established and may continue outside of court after the judicial review, claimants here are inexperienced litigants. This resonates with Harlow and Rawlings' discussion of 'litigation coalitions', that is, groups of individuals uniting to litigate on a common grievance. These coalitions can be ephemeral but need not be, and may seek to further their causes outside of the litigation sphere at the same time as preparing to litigate.[92] Crowdfunded coalitions can themselves form in relation to specific policy issues and may exist only until that issue is resolved, but others may be longstanding and develop perhaps unexpectedly into campaigns with reach beyond the initial intended scope of action. Campaigns are often volunteer-led, and while groups are on occasion professionally staffed, this is unlikely to include staff with legal strategy experience.

Groups here seek a national locus of effects, including systemic challenges to policies and practices, and direct claims largely at central government departments or non-departmental public bodies. The public authorities featuring in the most crowdfunding pages were the Department for Health and Social Care with 20 pages,[93] the Department for Transport with 15 campaigns, NHS England with 13, the Department for Education with 12 campaigns, and the Prime Minister and the Home Office with nine respectively. The most common subject matters were health, the subject of 33 crowdfunding pages, environment and planning with 19, education with 16, 12 relating to Brexit, and eight to both immigration and civil liberties. Some cases are brought on the most salient and contentious political issues of the day, such as

[92] Harlow and Rawlings (n 44), 113, 120.

[93] Although multiple healthcare campaigns advertised their cases using several crowdfunding pages, which somewhat inflates both this and the prevalence of the 'health' subject matter.

Brexit,[94] Scottish independence,[95] and the Covid-19 lockdown.[96] Indeed, a minority of cases here may be accused of seeking to resolve purely political issues in court, displayed starkly in the *Webster* litigation, which challenged the legality of the UK's notice of withdrawal from the EU under Article 50, raising £199,460 on CrowdJustice from 7,467 pledges.[97] The claimants were refused permission and the judge declared it belonged 'firmly in the political arena, not the courts', declaring the claim 'hopeless' and 'Totally Without Merit'.[98] Some cases in this category might be especially susceptible to the aforementioned concern that donors may be persuaded to donate based on political salience rather than through any justification on the CrowdJustice profile as to a case's merit.

iv) The established civil society organisation – national experienced litigants. These groups often challenge the legality of government policies and practices, providing a systemic focus. 49 cases were identified here, raising a combined £2,057,797 from 75,297 pledges, meaning the average pledge is £27.33. Again, the average appears to be lower in national than local cases. The environment featured most commonly, in 11 pages, followed by immigration in eight, and electoral politics and procurement each in five. The most common defendants featured were the Home Office in 11 crowdfunding pages, the Department for Health and Social Care in seven, Natural England in five, and the Prime Minister in four. The category incorporates organisations that were repeat litigants prior to their use of crowdfunding, using crowdfunding as an additional targeted source of litigation funding alongside existing income streams for general activities, such as Liberty and the Joint Council for the Welfare of Immigrants. Such established groups tend to have well-honed practices in the process of bringing claims, and some have in-house lawyers within their professionalised staff team. This professionalisation and legal resource is atypical of the wider crowdfunding field. However, the category also incorporates organisations that have begun litigating for the first time more recently using crowdfunding and have then litigated repeatedly, gaining influence in their policy areas. Most notably, the Good Law Project has, through crowdfunded cases, built a

[94] Liz Webster, 'Article 50 Challenge' (CrowdJustice, 2017) <https://www.crowdjustice.com/case/a50-chall-her-e50/>.

[95] Forward as One, 'People's Action on Section 30' (CrowdJustice, 2020) <https://www.crowdjustice.com/case/pas30/>.

[96] The People's Brexit (n 46).

[97] Webster (n 94).

[98] *R (Webster) v Secretary of State for Exiting the European* Union [2018] EWHC 1543 (Admin), Gross LJ at [24-25].

strategic litigation profile across various core themes,[99] employing a considerable professional staff team in a short timespan and even launching an independent law firm, Good Law Practice Limited, to support litigation brought by the Project and its partners.[100] Wild Justice has also developed a litigation profile due to the availability of crowdfunding, pledging to 'stand up for wildlife using the legal system and seeking changes to existing laws'.[101]

Conclusion

This chapter has provided a quantitative empirical account of the landscape of crowdfunding for judicial review, beginning to consider the diverse implications of this novel resource for the shape and character of legal mobilisation. A central argument in this regard has been that the dataset indicates crowdfunding invites into court social actors from outside the traditional image of legal mobilisation, with inexperienced groups and local-level groups dominating mobilisation activity. A typology accounting for these dimensions of experience and scale has been presented accordingly, proving crucial to structuring selection of case studies for the thesis' qualitative research, as the following methodology chapter outlines. By way of conclusion, and to anticipate the qualitative findings, it is useful to reflect on this core theme running through the chapter – the prominence of campaigning in crowdfunding appeals.

The chapter has highlighted the variability in funding levels, and suggested the likelihood of cases being funded is influenced as much by factors such as an emotive factual context or political saliency as it is the merit of the case. In some, although by no means all, cases, this emphasis may conflict with values of integrity and honesty, with considerable variability in how transparently these campaigns are conducted. Considered alongside a donor base which is often politically motivated but which may lack consciousness of administrative justice, this risks a disillusioning disconnect between donors' expectations and the soberingly technical reality of judicial review, particularly when encouraged to attach hopes of social change to cases which are filtered out at an early stage. This suggestion may raise questions as

[99] 'All issues' (Good Law Project) at https://goodlawproject.org/issues/. See also Jolyon Maugham KC and Gabriella De Souza Crook, 'Neither too early nor too late: Goldilocks litigation in the climate space' (2021) 22(4) Env.L.Rev. 263.

[100] 'Good Law Project launches new independent legal firm: 'Good Law Practice'' (Good Law Project, 24 May 2022) <https://goodlawproject.org/good-law-practice/>.

[101] Wild Justice, 'About Wild Justice' <https://wildjustice.org.uk/about/>.

to the light touch approach which CrowdJustice takes to regulating cases – that is, a case is allowed on the site if a lawyer has agreed to represent the claimant, with minimal oversight of the content posted. Discussion of the appropriate response to crowdfunding ought to be attentive to establishing a baseline level of transparency and disclosure in the information case owners provide to prospective donors, especially the legal arguments to be advanced and remedies sought. Yet what must also be emphasised in these discussions, and what this chapter demonstrates, is that in a hostile and expensive landscape for judicial review litigation, with a vastly reduced legal aid budget, crowdfunding does facilitate access for communities and organisations that seek accountability from local or central government but may otherwise be deterred from litigating due to lack of resource. In many cases, this has resulted in valuable substantive gains. Furthermore, far from most claimants finding fundraising simple, crowdfunding very often generates relatively limited amounts of money, and, as Chapter Four discusses, claimants are reliant on other mechanisms alongside it, such as costs-capping and conditional fee or pro bono legal representation. With the use of the crowdfunding model increasing in popularity, and a small minority of cases causing controversy, discussion of the phenomenon must be placed in the context of a wider judicial review landscape often inhospitable to, and bereft of funding for, collective uses of law.

Chapter Three: The Research Methodology

Introduction

This chapter discusses the project's methodology, outlining how the research questions and aims have informed core elements of project design, including the approach to the research methods and case selection. As discussed at length in Chapter Two, crowdfunding has proven a particularly valuable resource for – and, indeed, may by its design be uniquely placed to benefit – those litigating as part of wider social causes. This resonates with previous research on crowdfunding emphasising its role in 'public interest' litigation,[1] which has encouraged the focus of the present research on legal mobilisation. Influenced by this legal mobilisation framework, the research is guided by the following research question: 'How does crowdfunding affect the experiences of legal mobilisation by social reform actors within the judicial review system?'. To approach this, a further two sub-questions are employed to structure the research design: (i) 'What is the landscape of crowdfunded judicial review claims?' (ii) 'How is crowdfunding used in legal campaigns for social change?'

The former sub-question was addressed in Chapter Two, providing a much-needed quantitative overview of the crowdfunding field, and those findings served to inform the more focused, in-depth approach to sub-question (ii), by structuring the selection of qualitative case studies in the latter stage of research. In essence, then, this research follows an explanatory sequential design popular within mixed-methods social science research. Initial quantitative data gathering provides a general picture of the research problem – here, an empirical mapping of crowdfunding in judicial review. Following analysis of this data, with any particularly interesting findings identified, the researcher gathers qualitative data that elaborates upon and extends the broader yet necessarily less in-depth quantitative findings.[2] A mixed-methods approach combining features of positivism and interpretivism, Rosenberg claims, is valuable for developing strong legal mobilisation scholarship,[3] enabling as it does both generalisable

[1] Evan Hamman, 'Save the Reef: Civic Crowdfunding and Public Interest Environmental Litigation' (2015) 15 QUT L REV 159; Joe Tomlinson, 'Crowdfunding public interest judicial reviews: a risky new resource and the case for a practical ethics' [2019] PL 166.

[2] John Creswell, *Educational Research: Planning, Conducting, and Evaluating Quantitative and Qualitative Research* (Pearson 2020), 603-604. For discussion of mixed-methods research in socio-legal studies, see Alysia Blackham, 'When law and data collide: the methodological challenge of conducting mixed methods research in law' (2022) 49(S1) J.L.Soc'y S87.

[3] Gerald N Rosenberg, 'Positivism, Interpretivism, and the Study of Law' (1996) 21(2) L.& Soc.Inquiry 435, 455.

claims on the landscape and richer understanding of social actors' engagement with law in practice.

This study is animated by the concerns embodied in the legal mobilisation literature, especially the role of variables like opportunity structures and organisational resources in social actors' mobilisation of law. As discussed in Chapter One, crowdfunding arguably represents a novel form of resource which differs from the traditional conceptualisation of internal organisational resources, and its unique form may present distinct implications for the potential of resources beyond the primary role facilitating access to courts. Meanwhile, as the research traces the crowdfunded case studies from their conception to when they exit the legal system and beyond, it necessarily also take an interest in any effects associated with the litigation. The primary goal is not to explain causal questions such as why campaigners use law generally, but to explore and describe the processes by which campaigners have used law – and crowdfunding – in the cases selected, which may be transferable to other cases. This is common practice within case study research concerning legal mobilisation,[4] and the relationship between description and explanation is discussed in greater detail below. The adoption of a legal mobilisation framing is novel within the crowdfunding sphere, and provides a logical theory for ordering findings around crowdfunding's observed role in social actors' litigation efforts.

The research questions, and the overarching aim to understand crowdfunding's place in actors' engagement with the legal system to achieve particular ends, encourage a socio-legal research paradigm. Socio-legal studies defies an agreed definition,[5] in view partly of the 'anarchic heterogeneity' characterising its scholarship.[6] It would be fair to suggest it has often been framed less as a coherent field than an insurgent challenge to traditional legal scholarship's doctrinal focus – although in practice, researchers often work across doctrinal and socio-legal perspectives.[7] The field challenges doctrinal scholarship's internal view of law,

[4] See for instance Carolyn Abbot and Maria Lee, *Environmental Groups and Legal Expertise: Shaping the Brexit process* (UCL Press 2021); Lisa Vanhala and Jacqui Kinghan, *Using the law to address unfair systems* (The Baring Foundation 2019).

[5] Dermot Feenan, 'Exploring the 'Socio' of Socio-Legal Studies' in Dermot Feenan (ed), *Exploring the 'Socio' of Socio-Legal Studies* (Palgrave Macmillan 2013), 4.

[6] Roger Cotterrell, 'Subverting Orthodoxy, Making Law Central: A View of Sociolegal Studies' (2002) 29 J.L.Soc'y 632, 632.

[7] Emilie Cloatre and Dave Cowan, ''Indefensible and irresponsible': Interdisciplinarity, truth and #reviewer2' in Naomi Creutzfeldt, Marc Mason and Kirsten McConnachie (eds), *Routledge handbook of socio-legal theory and methods* (Routledge 2020), 97.

dedicated to explaining the law through examining legal texts,[8] which can implicitly contain a positivist positioning of law as a relatively neutral entity providing objective truth, to be addressed without recourse to political considerations.[9] Socio-legal research, then, analyses law externally, highlighting the nonlegal social forces determining its design and operation in practice.[10] This emphasis on social forces, by implication, encourages the study of law using the same tools used to study social phenomena.[11] Given the thesis' core research questions are empirical in nature, a socio-legal approach is very apt indeed – lying within the growing body of scholarship using empirical methods to strengthen understanding of the judicial review process.[12] In this regard, the socio-legal endeavour is instructive in encouraging cross-disciplinary use of social science methodological tools to address empirical problems.[13]

Conceptually, some core foci of socio-legal thinking also help guide the research. First, an attentiveness to the co-constitutive nature of law and society, that is, that law shapes and is shaped by social relations and the actions of nonlegal actors.[14] This helps inform the research focus on understanding how movement and community groups – whose members may bring certain expectations and aspirations associated with law – interact with the judicial review system. While still engaging with legal actors involved in cases, the study is animated by an

[8] There have recently been very welcome attempts to articulate doctrinal scholarship's method and value. See Jason NE Varuhas, 'Mapping Doctrinal Methods' in Paul Daly and Joe Tomlinson (eds), *Researching Public Law in Common Law Systems* (Edward Elgar 2023, forthcoming) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4087836>; Alan L Bogg, 'Doctrinal Method in Labour Law: Potential, Problems, Prospects' in Alysia Blackham and Sean Cooney (eds), *Research Methods in Labour Law: A Handbook* (Edward Elgar 2023, forthcoming) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4474261>. All webpages in this chapter last accessed 11 September 2023 unless otherwise stated.

[9] Anthony Bradney, 'Law as a Parasitic Discipline' (1998) 25(1) J.L.Soc'y 71, 76-77; Cloatre and Cowan (n 7), 104.

[10] DJ Galligan, 'Introduction' (1995) 22 J.L.Soc'y 1, 6; Robert A Kagan, 'What Socio-Legal Scholars Should Do When There is Too Much Law to Study' (1995) 22 J.L.Soc'y 140, 143.

[11] Christopher McCrudden, 'Legal research and the social sciences' (2006) 122 L.Q.R. 632, 641.

[12] For an historical overview of the increasing acceptance of empirical research within public law scholarship, see Maurice Sunkin, 'The Use of Empirically Based Information when Reforming and Evaluating Judicial Review' in Andrew Higgins (ed), *The Civil Procedure Rules at 20* (OUP 2020).

[13] David Cowan and Daniel Wincott, 'Exploring the 'Legal'' in David Cowan and Daniel Wincott (eds), *Exploring the 'Legal' in Socio-Legal Studies* (Palgrave Macmillan 2015).

[14] Susan S Silbey, 'What Makes a Social Science of Law? Doubling the Social in Socio-Legal Studies' in Feenan (ed), *Exploring the 'Socio' of Socio-Legal Studies* (n 5), 25, 29.

interest in the perspectives and experiences of campaigners – who in many cases are not legal experts – bringing the crowdfunding campaigns, taking a largely inductive perspective from the bottom up. Second, socio-legal studies encourage a focus on nonlegal actors' experiences in their interactions with law, and on law as a communal but uneven resource for channelling power. This aligns with and sharpens the interest in crowdfunding's role in disrupting which nonlegal actors can access law's power and for which purposes. Implicit in these foci is a constructionist approach to knowledge and law's status, albeit with exceptions,[15] which rightly acknowledges law as a construct of human collaboration and the artificiality of studying law entirely separately from society and politics.[16] In this regard, the thesis is cautiously non-positivist. More broadly, I am reluctant to endorse the radical constructionist view of social life, that there is no objective world 'out there', but that individuals produce their subjective realities.[17] However, I recognise constructionism to the degree that law and social relations are mutually constitutive, affected by and affecting the experiences of nonlegal actors. By implication, then, research cannot adequately capture lived experience of social interactions with law in a way that produces grand generalisable theories,[18] and more modest explanatory concepts should be developed. This encourages the use of illustrative and non-generalisable case studies.

Research design – case study research

Overview

This research uses a case study design, and takes a multiple-case approach, given its appropriateness to the research aims. There is a plethora of definitions and strategies offered for case study research, not least because some of the leading scholars adopt divergent epistemological perspectives.[19] Gerring identifies what is distinctive about the design: 'an intensive study of a single unit for the purpose of understanding a larger class of (similar)

[15] See Brian Z Tamanaha, *Realistic Socio-Legal Theory* (OUP 1997).

[16] David Ibbetson, 'Historical Research in Law' in Peter Cane and Mark Tushnet (eds), *Oxford Handbook of Legal Studies* (OUP 2005), 863.

[17] Piergiorbio Corbetta. *Social Research: Theory, Methods and Techniques* (Sage 2003), 25.

[18] Cotterrell (n 6), 637.

[19] See for instance the realist approach of Yin and the interpretivist approach of Stake: Robert K Yin, *Case Study Research: Design and Methods* (4th edn, Sage 2009); Robert E Stake, *The Art of Case Study Research* (Sage 1995).

units'.[20] This recognises that researchers undertaking case studies seek to observe both what is particular to, and transferable beyond, the individual unit, and ought to distinguish between each type of observation – case studies 'partake of two empirical worlds'.[21] Yin notes that research which is framed through 'how' or 'why' questions is well-suited to approaches such as case studies, histories, and experiments, by contrast to 'what' questions, for which a broader array of approaches are appropriate.[22] The present research comprises two research questions. The first asks a 'what' question – 'What is the landscape of crowdfunded judicial review claims?' – and was approached using quantitative methods. The second asks a 'how' question – 'How is crowdfunding used in legal campaigns for social change?' – and it is this phase of research for which the case study design is employed. Within the strategies relevant to 'how' or 'why' questions, Yin claims the case study design is most appropriate where a question is asked about contemporary events over which the researcher has little control.[23] Litigation crowdfunding is certainly a contemporary – and growing – phenomenon – each case study selected pertains to litigation since 2018, and the researcher cannot influence and control the study, as would characterise an experiment where particular variables can be controlled. The case study design, then, neatly fits the research aims and question. Many features render the design particularly insightful for this study, and have made it a popular approach within legal mobilisation scholarship.[24] They enable cases' full lifecycles to be studied, from litigants becoming aware of the relevant issues through to a case's aftermath, including any 'legacy' effects.[25] In providing closeness to reality and generating context-dependent knowledge, case studies draw attention to the nuances of a phenomenon,[26] yielding rich insights into the perceptions and experiences of various social actors in using law to further causes, enabling understanding of how crowdfunding is incorporated within groups' engagement with law. This

[20] John Gerring, 'What Is a Case Study and What Is It Good for?' (2004) 98(2) APSR 341, 342.

[21] ibid 345.

[22] Yin (n 19), 11.

[23] Yin (n 19), 13.

[24] See for instance, Mark Aspinwall, 'Legal mobilization without resources? How civil society organizations generate and share alternative resources in vulnerable communities' (2021) 48(2) J.L.Soc'y 202; Jeffrey R Dudas, 'In the Name of Equal Rights: "Special" Rights and the Politics of Resentment in Post-Civil Rights America' (2005) 39(4) L.& Soc'y Rev. 723; Lisa Vanhala, Shauneen Lambe and Rachel Knowles, ''Let Us Learn': Legal Mobilization for the Rights of Young Migrants to Access Student Loans in the UK' (2018) 10(3) JHRP 439.

[25] Michael McCann, 'Law and Social Movements: Contemporary Perspectives' (2006) 2 Annu. Rev. Law Soc. Sci. 17, 34.

[26] Bent Flyvbjerg, 'Five Misunderstandings About Case-Study Research' (2006) 12(2) QI 219, 223.

may include its practical functions, facilitating access to courts, and potentially also symbolic functions, for instance bolstering groups' narrative constructions around participation or legitimacy. The research therefore enables detailed understanding of the mechanisms and processes at work, knowledge which is potentially transferable beyond the specific cases and can inform theory generation.

Case study research often employs multiple methods, whether qualitative and quantitative or purely qualitative, to triangulate findings and explore nuances, including contradictions, within the data.[27] As discussed later, the present study uses multiple qualitative methods – namely, qualitative interviews and document analysis – enabling triangulation and corroboration of results, or indeed discovery of contradiction across methods.[28] Combining approaches allows for one method's results to illustrate and clarify those of another – the methods can be complementary, and even extend the breadth of enquiry by addressing different components of the research question.[29] This can provide multiple perspectives on each case,[30] and where methods are 'in conversation with one another' they can generate more nuanced understandings of the complex social world than a single method.[31]

Within case study research, the multiple-case design requires particular consideration. Though political science and anthropology often regard 'comparative case studies' as a separate design in itself, multiple-case designs are more commonly considered within the same framework as single-case studies.[32] Studying multiple cases can provide a more accurate and complete picture of the research question – importantly, this is distinct from claiming to increase the statistical representativeness and generalisability, which is unlikely since the

[27] Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010), 939.

[28] Alan Bryman, 'Integrating quantitative and qualitative research: how is it done?' (2006) 6(1) Qualitative Research 97, 105.

[29] Jennifer C Greene, Valerie J Caracelli and Wendy F Graham, 'Toward a Conceptual Framework for Mixed-Method Evaluation Designs' (1989) 11(3) Educational Evaluation and Policy Analysis 255, 259.

[30] Courtney A McKim, 'The Value of Mixed Methods Research: A Mixed Methods Study' (2017) 11(2) Journal of Mixed Methods Research 202, 213.

[31] Laura Beth Nielsen, 'The Need for Multi-Method Approaches in Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (OUP 2010), 955.

[32] Yin (n 19), 53.

environmental context is key to each case and impacts the data.[33] Multiple cases can provide compelling and robust evidence across multiple sites, although there is inevitably a trade-off wherein greater breadth may come at the expense of some of the depth found in a single-case study. One criticism of McCann's influential and enduring legal mobilisation research,[34] for instance, has been that the sheer number of case studies he selected within the pay equity movement in the US was at odds somewhat with his intention to provide interpretivist depth of understanding in the cases.[35] The present research, then, uses six in-depth case studies to optimise nuance and granular depth, providing a greater range of experiences than a single case can – vital for an under-researched phenomenon – while maintaining a focus on qualitative richness and the diverse, potentially contradictory, perspectives in each case.

Exploratory, descriptive, explanatory?

Just as there are various definitions of the case study method, there is a plurality of approaches to the research design itself. Yin, for instance, states research can be exploratory, descriptive, or explanatory.[36] Similarly, Gerring separates the issue into whether one takes an exploratory or confirmatory research strategy, and makes descriptive or causal claims.[37] Exploratory social science seeks to generate new theory, while confirmatory research tests existing theory to confirm or disconfirm by falsification.[38] Although often undervalued, exploratory work regularly proves incredibly valuable within social science disciplines – both exploratory and confirmatory strategies are important.[39] Case study research, it is often argued, has a natural affinity with exploratory research, as its loose 'fuzziness' enables the generation of many insights and hypotheses but may complicate a confirmatory falsification agenda.[40] This study adopts an exploratory rather than confirmatory approach to research, due to the relatively nascent research field on litigation crowdfunding in the UK. An expressly confirmatory approach, it is submitted, would not represent a logical aim at this stage. While the case studies

[33] Lisa Webley, 'Stumbling Blocks in Empirical Legal Research: Case Study Research' [2016] Law and Method 1, 13.

[34] Michael W McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (University of Chicago Press 1994).

[35] Rosenberg (n 3), 446.

[36] Yin (n 19), 7.

[37] Gerring (n 20), 346, 349.

[38] See Karl Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* (Routledge 1969).

[39] Gerring (n 20), 349-350.

[40] Gerring (n 20), 350.

may develop or disconfirm certain observations from previous studies, including the quantitative work in Chapter Two, and will draw upon the legal mobilisation framework, there is not a sufficient research corpus addressing crowdfunding upon which to build a falsification programme. By contrast, the exploratory approach is appropriate here, in making explicit space for intuitive and inductive knowledge production.[41] Given the limited knowledge in the area and the growing notion that crowdfunding campaigns are conducted in variable and unpredictable ways, it appears wise to follow a research design that allows for discovery of potentially unforeseen elements of the cases. Such a consideration has been incorporated into the research sub-question, which, by asking how crowdfunding is used in campaigns, enables broad and flexible exploration of 'what is happening'.[42]

Equally, case studies – and, indeed, empirical research more broadly – can be differentiated by the type of claims the researcher seeks to make using their data, whether descriptive or causal. This relates to the notion of a 'logic of inference', for which King, Keohane, and Verba have been especially prominent proponents, wherein the common, underlying aim of social science, across quantitative and qualitative approaches, is to make generalisable descriptive and, especially, causal inferences.[43] This worldview is problematic in some respects, discussed below, but its distinction between descriptive and causal approaches is instructive. Both descriptive and causal inferences seek to use 'facts we know to learn about facts we do not know',[44] but differ in the claims made. Descriptive inferences involve describing observations about the sample and, where appropriate, drawing generalisations to learn about the world from which it is drawn, while causal inferences require a similar process but seek to discover whether an independent variable has a causal effect on a dependent variable, and whether this can be said to apply to the research phenomenon beyond the sample.[45] As with exploratory research, descriptive inference is often undervalued,[46] but description is far from a 'low-level aspiration' where a phenomenon is under-researched; rather, descriptive inferences enable the categorisation of findings which can enable valuable theory-

[41] Christopher K Streb, 'Exploratory Case Study' in Albert J Mills, Gabrielle Durepos and Elden Wiebe (eds), *Encyclopedia of Case Study Research* (Sage 2012), 372.

[42] Yin (n 19), 9.

[43] Gary King, Robert Keohane and Sidney Verba, *Designing social inquiry: Scientific inference in qualitative research* (Princeton University Press 1994).

[44] ibid 46.

[45] Lee Epstein and Gary King, 'The Rules of Inference' (2002) 69(1) U.Chi.L.Rev. 1, 34, 36.

[46] John Gerring, 'Mere Description' (2012) 42(4) B.J.Pol.S. 721.

building and, in future, testing.[47] Case study research is commonly thought most suited for descriptive inferences, given the difficulty manipulating the case unit's environment to test causal relationships,[48] a view echoed within the socio-legal community.[49] This does not always hold – case studies can provide strong bases for causality, such as through 'process tracing', involving studying evidence on processes and sequences of events to hypothesise explanations,[50] which has proven popular within political science, a discipline with a strong tradition of legal mobilisation research.[51] Notwithstanding these relatively abstract questions as to the suitability of causal case studies within social scientific and socio-legal research, the generalisable causal approach is inappropriate in this project, not least given the limited number of case studies compared to the wider crowdfunding field. The research does not ask an explicitly causal question or seek to test any relationships between variables in a way enabling generalisation. Rather, in asking a 'how' question, it seeks to describe and analyse experiences of crowdfunded legal mobilisation, to improve understanding and generate theory regarding these processes and mechanisms, which may indicate potentially generalisable causal relationships for future causal studies to test, since good description is a crucial antecedent to explanation.[52] That said, in studying in detail the processes of mobilisation and the use of crowdfunding in individual cases, it should be possible to make non-generalisable causal statements, explaining processes and outcomes in specific case studies, when appropriately and carefully evidenced by triangulating data sources.

The distinction between descriptive and generalisable explanatory approaches has, then, proved useful in structuring the boundaries of research. Yet King, Keohane, and Verba's 'logic of inference' ought not be uncritically adopted without considering its implications for the conduct of qualitative research, and case studies in particular. The attempt to unite empirical scholarship as seeking to achieve one goal of generalisable inferences may, on its face, appear

[47] Webley (n 33), 17-18.

[48] Gerring (n 20), 346.

[49] Webley (n 33), 20.

[50] Andrew Bennett and Jeffrey T Checkel, 'Process Tracing: From Philosophical Roots to Best Practices' in Andrew Bennett and Jeffrey T Checkel (eds), *Process Tracing: From Metaphor to Analytic Tool* (CUP 2015).

[51] See for instance Lisa Vanhala, 'Process Tracing in the Study of Environmental Politics' (2017) 17(4) Global Environmental Politics 88.

[52] Marcus Kreuzer, 'The Structure of Description: Evaluating Descriptive Inferences and Conceptualizations' (2019) 17(1) Perspectives on Politics 122, 122.

value-neutral, but masks an unacknowledged positivist epistemology,[53] and is ill-equipped to recognise case study research's unique value. Embedded in their account of 'inferences' is a statistical logic, conceptualising all empirical activity as making 'observations', to be represented as values assigned to variables, for testing the statistical reliability of inferences to the broader population.[54] Through this lens, a case study would add very little value indeed, given the number of 'observations' is far fewer than the number of variables, and it would add only a single observation to the statistical test.[55] Qualitative case studies are ill-suited to the (quasi-)experimental logic of control conditions, random sampling, and sample size.[56] The problem with the 'logic of inference' is not that inferences can never be made from case studies, but that assuming all empirical research must follow the statistical approach to external validity, through generalisation, does not properly recognise the value of qualitative work. Even some accounts that support qualitative case study research have failed to make this distinction, including legal scholarship importing King, Keohane, and Verba's approach from quantitative political science somewhat uncritically. In light of this, some suggest that generalising beyond the particular unit of study is unachievable and that qualitative research lacks external validity. Stake, for instance, proposes to instead prioritise knowing unique cases deeply,[57] and Flyvbjerg argues non-generalisable knowledge enriches understanding, with formal generalisation 'overrated'.[58] Yet to dismiss notions of external validity would be unwise – rather, it can be reframed within qualitative research to better reflect qualitative assumptions. 'Generalisation' can thus be recast as 'transferability' – how well the developed theory 'fits' into other contexts beyond the case study.[59] The most compelling and commonly used approach here, including within socio-legal studies,[60] is to adopt what Yin calls analytical generalisation – the researcher generalises results 'to theory' by comparing them to prior findings and developing theory. This

[53] James Johnson, 'Consequences of Positivism: A Pragmatist Assessment' (2006) 39(2) Comp.Pol.Stud. 224, 246.

[54] Timothy J McKeown, 'Case Studies and the Statistical Worldview: Review of King, Keohane, and Verba's Designing Social Inquiry: Scientific Inference in Qualitative Research' (1999) 53(1) International Organization 161, 166.

[55] ibid 169, 173.

[56] Sharan B Merriam, *Case Study Research in Education* (Jossey-Bass Publishers 1988), 173.

[57] Stake (n 19), 7.

[58] Flyvbjerg (n 26), 226-227.

[59] Egon G Guba and Yvonna S Lincoln, *Effective evaluation* (Jossey-Bass Publishers 1981), 118; Yvonna S Lincoln and Egon G Guba, *Naturalistic Inquiry* (Sage 1985).

[60] Galligan (n 10), 12.

operates unless future research contradicts the theory developed, and is strengthened where those studies offer support.[61] Other researchers can then determine whether the theory developed is applicable in their differing contexts beyond these case studies.

The approach adopted here is, then, relatively typical of socio-legal case study research, seeking exploratory knowledge generation and potentially transferable theory-building with a primary focus on descriptive findings. This echoes recent case study research of legal mobilisation by Abbot and Lee, exploring environmental groups' use of legal expertise to shape the legislative and regulatory approach to post-Brexit environmental protection.[62] Although the study's approach to the case study method could perhaps be framed more explicitly, it explores a nascent area of research ripe for study, using a legal mobilisation perspective and describing and analysing observations. It specifies that it does not seek express causal links, but nonetheless raises issues in an exploratory sense and, though stopping short of definitively assessing causality, in places proximately and tentatively suggests where the environmental sector may have exerted influence. This work, among others, has helped highlight a viable approach for the present research, which carefully traverses the limits of what claims can be made from research that does not explicitly test causal mechanisms and effects to generalise to the population – but leaves open the possibility of non-generalisable explanation. The following section details the cases selected for this primarily exploratory and descriptive study.

Case selection

Employing the typology

Case selection decisions have been informed by the typology discussed in Chapter Two, selecting two case studies within each category. These selection decisions follow a pragmatic 'purposeful' sampling approach, guided by the research questions and the focus on legal mobilisation. Such a pragmatic approach, designed prior to the research commencing, targets the most 'information-rich' cases offering most insight to the research aims –[63] this is appropriate given research on judicial review crowdfunding remains relatively nascent and will thus benefit from case studies judged to provide the most rich and in-depth knowledge. Two distinct reasons underpinned the decision to select cases across the categories in the typology.

[61] Yin (n 19), 38.

[62] Abbot and Lee (n 4).

[63] Nick Emmel, *Sampling and Choosing Cases in Qualitative Research: A Realist Approach* (Sage 2013), 33.

First, Chapter Two, and its typology, represents the most comprehensive attempt to categorise and structure the landscape of crowdfunded judicial review. Using the typology thus enables identification and selection of cases with varying features, ensuring useful information-gathering amid a dearth of existing empirical research. Specifically, it facilitates a 'stratified purposeful' selection strategy, combining features of the 'typical' case and 'maximum heterogeneity' sampling approaches by selecting cases which are typical of each heterogenous category – this can capture major variations and may highlight a 'common core' across the cases.[64] Indeed, George and McKeown regard typological sampling as a systematic way to ensure sampling covers various logically possible conditions.[65] This concern is arguably more pertinent where case studies are primarily explanatory and explicitly comparative across the cases, whereas the present study is more exploratory and descriptive, though capable of non-generalisable explanation, and cross-case comparison is not the explicit goal. Yet a systematic typological approach remains useful in guiding selection towards the most appropriate units within the universe of crowdfunding, and providing a foundation for developing theory through the case studies.[66]

Second, case study research is particularly vulnerable to selection bias. Researchers may be prone to select cases because they have observed certain effects in those cases – that is, selection based on the dependent, rather than the independent, variable.[67] For instance, a crowdfunded judicial review claim might be observed to have particularly interesting or important legacy effects, presenting a temptation to select that case by virtue of that dependent variable rather than on rightness of fit to representing the research field. This concern is less problematic given this study is not focused on generalising causal effects between independent and dependent variables – a difficult task in case study research where the case is inextricably bounded with its environmental context. It was nonetheless deemed important to ensure relative distance between the researcher and case selection, by ensuring the selection strategy is not

[64] Michael Patton, *Qualitative research and evaluation methods: Integrating theory and practice* (4th edn, Sage 2015), 305.

[65] Alexander L George and Timothy J McKeown, 'Case Studies and Theories of Organizational Decision Making' in Robert F Coulam and Richard A Smith (eds) *Advances in Information Processing in Organizations* (JAI Press 1985), 28.

[66] ibid.

[67] Webley (n 47), 11; Barbara Geddes, *Paradigms and Sand Castles: Theory Building and Research Design in Comparative Politics* (University of Michigan Press 2003).

related to the dependent variable.[68] The typology provides a construction of the 'independent variable' which differs across the studied cases – the characteristics identified as typical to the heterogenous categories. The typology contains two core features, the locus of effects and the group's level of litigation experience, that bound each category and inform case selection. By providing characteristics to identify what could be termed the independent variable, and select cases accordingly, this more systematic selection strategy reduces the capacity for value judgements by the researcher, managing selection bias risk. While the choice of categories and identification of variables were themselves researcher-led, meaning researcher judgement cannot be entirely removed,[69] selection is detached somewhat from the potential for researcher bias having been developed based on observations of CrowdJustice profiles, grounding it in the application of observable, relatively rigorous criteria.

As part of the stratified purposeful sampling approach, a 'typical' case strategy was followed to select the two cases within each heterogenous typological category. This entails developing a profile of attributes which average cases in each category possess,[70] to be used as key criteria to identify typicality. The cases identified as typical are illustrative of the phenomenon as it applies to each category, rather than definitive.[71] Using the two-by-two matrix provided in Chapter Two, each typological category has corresponding tractable criteria for selecting cases to illuminate understandings of the phenomenon: groups' locus of effects (local/regional or national) and litigation experience (experienced or inexperienced).

Two further matters should be noted before outlining the case studies selected in each quadrant of the typology. First, it was decided not to sample cases from the 'Local pressure group campaigner' quadrant, because, as Chapter Two discussed, there were very few – if any – cases, at the time of sampling at least, falling within this category. A claim by SAVE Britain's Heritage could arguably, but not straightforwardly, apply here. Even without firmly resolving that particular quandary, though, it should be clear that, while a theoretically relevant category for understanding mobilisation patterns, including as crowdfunded legal mobilisation matures,

[68] Epstein and King (n 45), 113.

[69] There is of course, epistemological debate as to whether researcher bias and judgment can ever be removed, especially in case study designs. Scholars often suggest biases are unavoidable and it should be acknowledged how they affect the design (see Guba and Lincoln, *Effective evaluation* (n 59) 148). That said, the present sampling approach is submitted to at least substantially minimise these issues.

[70] Merriam (n 56), 50.

[71] Emmel (n 63), 39.

it is not one which presently accounts for much activity. In a nascent research field, then, it was logical to focus resources on the three quadrants representing the dominant terrain of activity. Second, and partly in view of this decision, two case studies are sampled from each of the three categories. Given the relatively small universe of relevant participants within each case study, to sample only three case studies in total may risk a low sample size for the overall study. Sampling two case studies in each category thus strengthened the overall sample and the heterogeneity of experiences, without stretching resources too thinly as to lose sight of each case's in-depth qualitative richness and uniqueness.

Introducing the cases

This section introduces the specific cases selected using the typological sampling schema, justifying their inclusion and briefly outlining each case.

Local community groups:

i) Up the Elephant challenging the demolition of the Elephant and Castle shopping centre for a redevelopment scheme

Up the Elephant comprised a coalition of local campaigners, including representatives of groups such as Southwark Defend Council Housing, Latin Elephant, Southwark Notes, and the 35% Campaign, organising to resist the demolition of the Elephant and Castle shopping centre. The 35% Campaign, established since 2007, is dedicated to engaging in planning matters concerning the regeneration of the Elephant and Castle area, seeking to resist gentrification and ensure regeneration benefits local people,[72] and was a particularly notable contributor to campaigning. The judicial review in question challenged Southwark Council's grant of a planning application to demolish the Elephant and Castle shopping centre and build new shops and homes, on the basis primarily that the council's planning committee was misled as to the maximum amount of affordable housing which the scheme could provide. The High Court[73] and Court of Appeal[74] dismissed the claim. Both the High Court claim and the appeal were crowdfunded, across two pages raising £8,225 and £3,528.[75] This is the first judicial

[72] 'About us' (35% Campaign) <https://www.35percent.org/about/>.

[73] *Flynn v London Borough of Southwark Council* [2019] EWHC 3575 (Admin).

[74] *Flynn v London Borough of Southwark Council and Anor* [2021] EWCA Civ 827.

[75] Jerry Flynn for Up the Elephant, 'Save Elephant and Castle's diverse community!' (CrowdJustice, 2019) <https://www.crowdjustice.com/case/stop-the-elephant-shopping-centre-destruction/>; Jerry Flynn for Up the

review brought by these groups as a claimant. The 35% Campaign has previously given evidence at planning inquiries and tribunals,[76] and was an interested party in a judicial review brought by Southwark Council against the Secretary of State for Communities and Local Government,[77] appearing at the permission hearing, but the parties signed a Consent Order prior to the full hearing.[78]

ii) Croyde Area Residents Association (CARA) challenging an erroneous grant of planning permission in an Area of Outstanding Natural Beauty

CARA is a residents' association in Croyde, North Devon, and is a registered charity with a mission to:

> stimulate public interest, to ensure that the villages of the Georgeham Parish, and the surrounding Area of Outstanding Natural Beauty (AONB) are protected, preserved, and improved for the benefit of the whole community for generations to come.[79]

As a local residents' association, it is not well-characterised as a socio-political 'campaign group' litigant, and is thus markedly different from other organisations in the case studies. It did, though, mobilise law in one instance in pursuit of a significant collective goal, fitting neatly within the 'Local community group' type as an inexperienced 'one-shotter' litigant with localised goals, addressing an important environment and planning issue – the core area of local community litigation in the database. It has also engaged in some planning matters since the claim. Its mission to preserve the area's surroundings, and residents and visitors' quality of life, led it to challenge by judicial review a grant of planning permission to Parkdean Holiday Parks, the interested party in the litigation. Parkdean's planning application had been intended solely to change the opening times of the existing accommodation in its caravan park. However,

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Elephant, 'We're fighting on – JR Appeal to Save the Elephant's Diverse Community' <https://www.crowdjustice.com/case/save-the-elephants-diverse-com-appeal/>.

[76] It is currently crowdfunding to participate in an inquiry: Jerry Flynn, 'Homes not office blocks! Help defeat Lendlease's Elephant Park plans!' <https://www.crowdjustice.com/case/no-to-the-elephant-h1-office-b/>.

[77] They used crowdfunding to fund legal representation: Jerry Flynn, 'Aylesbury; the Right to a Community' (GoFundMe, 2016) <https://www.gofundme.com/f/aylesbury-the-right-to-a-community-2uefgf2s>.

[78] 'Secretary of State overturns previous decision regarding Aylesbury estate compulsory purchase order' (Southwark Council, 25 April 2017) <https://www.southwark.gov.uk/news/2017/apr/secretary-of-state-overturns-previous-decision-regarding-aylesbury-estate-compulsory-purchase-order>.

[79] 'Welcome to CARA (Croyde Area Residents Association)' (CARA) <https://www.cara-northdevon.co.uk/home>.

in a site location plan, the defendant local authority, North Devon District Council, drew a red line around an area of land much larger than Parkdean owned, meaning the permission mistakenly included around 22 hectares of land within the red line which previously had no permission to station caravans or lodges – this included around 12 hectares owned by third parties including the National Trust. All parties agreed the planning permission was unlawful. So far, so straightforward. Given this highly unique factual matrix, though, the challenge was brought seven years out of time – exceeding the usual six-week time limit in planning judicial review claims, to put it lightly.[80] The council accepted the permission should be quashed, but Parkdean argued otherwise. While CARA's four grounds of challenge were plainly made out and not disputed, the case turned on whether the case's facts were sufficiently exceptional and unique, following the decision in *Thornton Hall*,[81] to justify extending time and quashing the permission, and whether the case was barred by a combination of provisions under the Town and Country Planning Act 1990 and the prior grant of a Lawful Development Certificate. In the view of Lieven J:

> the interests of the credibility of the planning system weighs heavily in favour of quashing the permission. It would be very hard to explain to a member of the public why a permission which was granted in complete error … should not be quashed.[82]

The permission was thus quashed. Parkdean did appeal, but withdrew prior to the Court of Appeal hearing.[83] CARA crowdfunded their claim – across the High Court case, and fundraising for the prospect of the appeal, it raised an impressive £82,031.[84] This sum is not 'typical' of this category – however, the core demographic characteristics of the claimants, a local community organisation, and their challenge, concerning the local environment, are illustrative of the category.

Emerging social reformers:

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[80] CPR 54.5(5).

[81] *R (Thornton Hall Hotel Ltd and anor) v Thornton Holdings Ltd* [2019] EWCA Civ 737; [2019] PTSR 1794.

[82] *R (Croyde Area Residents Association) v North Devon District Council* [2021] EWHC 646 (Admin); [2021] PTSR 1514, Lieven J at [86].

[83] Letter from David Liebenberg to CARA Members, 'Re: Judicial Review of planning application at Ruda Holiday Park' 16 November 2021 <https://mcusercontent.com/3b8b169d1f1acbd7fbdeeca39/files/70b0f5e3-a4a5-0beb-c38b-a7aaffbaabb5/Open_Letter_to_CARA_Members.pdf>.

[84] CARA (Croyde Area Residents Association), 'Stop harm to North Devon Coast Area of Outstanding Natural Beauty' (CrowdJustice, 2020) <https://www.crowdjustice.com/case/save-north-devon-coast-aonb/>.

i) 999 Call for the NHS challenging 'Accountable Care Organisations'.

The first case study in this category is the judicial review brought by campaign group 999 Call for the NHS, concerning the proposed introduction by NHS England of 'Accountable Care Organisations' (ACOs). This campaign reflects a 'typical' case within this category, according to the sampling criteria – the claim was brought by an inexperienced litigant seeking national-level effects. The group launched five crowdfunding pages on CrowdJustice, corresponding to stages of the litigation, and raised over £60,000 across those pages.[85] This total considerably exceeds the average that cases tend to raise over their lifecycle and, as discussed, this category is responsible for many campaigns raising higher rates. The group is a grassroots organisation, comprising a web of local branches feeding into a core national group, and its website states it is comprised of 'passionate volunteers' and that its grassroots status prevents political 'party games'.[86] It formed relatively recently, in 2014, advocating for high-quality NHS provision and opposing budget cuts, and from 2017focused on the introduction of ACOs. The ACO scheme refers to an area-based model of healthcare provision, where a healthcare provider or alliance of providers takes responsibility to deliver services to the area, using a budget allocated according to the area's population.[87] This budget is set at a level which means savings need to be made, and providers are incentivised to review service provision without, in theory, a single organisation such as a particular hospital experiencing the entire impact of revenue removal.[88] Following the publication in 2017 of a draft contract by NHS England setting out payment mechanisms for ACO providers, 999 Call judicially reviewed NHS England. It argued that the contract being population-based would result in poor service quality, in decoupling budgeting from considerations of the number of patients treated and the complexity of needs. It submitted that the payment mechanism was unlawful under the Health and Social Care Act 2012, seeking a declaration to that effect. The Act requires payment to be made for a particular service, whereas the draft payment mechanism, it argued, did not set prices for particular services but paid a global amount irrespective of the services provided. The litigation therefore clearly intends a national locus of effects, with a systemic focus. The

[85] See for instance 999 Call for the NHS, '#Justice4NHS - Stage 5 - Court of Appeal' (CrowdJustice, 2018) <https://www.crowdjustice.com/case/justice4nhs-stage5-courtofappeal/>.

[86] 'WELCOME 2022' (999 Call for the NHS, 2020) <https://www.999callfornhs.org.uk/> accessed 13 June 2023. The group's website domain appears to have since expired.

[87] Alex Bate, *Accountable Care Organisations* (House of Commons Library CBP 8190, 2018) 1.1.

[88] Sally Ruane, 'Integrated care systems in the English NHS: a critical view' (2019) 104 S. Arch Dis Child 1024.

claim was unsuccessful in the High Court,[89] and the Court of Appeal,[90] and was refused permission to appeal to the Supreme Court. 999 Call has continued its campaign efforts since the judicial review, including supporting a further crowdfunded judicial review brought by a GP, the *Khurana* claim in 2022.[91] This enables comprehensive study of the lifecycle, including the legacy effects, of an illustrative typical case.

ii) Reclaim These Streets challenging the policing of protests after Sarah Everard's murder

The second case study in this category is the claim brought by the Reclaim These Streets coalition, formed by a small group of women following Sarah Everard's murder by a police officer in March 2021.[92] The group organised a vigil in Clapham following Everard's disappearance, an event the Metropolitan Police claimed would breach the Covid-19 regulations limiting gatherings. Ultimately, the group was forced to cancel the vigil after several attempts to reach an arrangement with Covid-secure measures received short shrift from the Police, meaning the organisers could not guarantee that people attending the vigil, even socially distanced, would not put themselves at legal risk of a Fixed Penalty Notice.[93] This came after the claimants initially applied for urgent interim relief in the Administrative Court, seeking a declaration that the Covid regulations must be applied compatibly with Articles 10 and 11 of the Human Rights Act 1998 concerning freedom of expression and peaceful assembly, in which Holgate J declined to grant interim relief but sought to clarify the law's application.[94] This interim application was itself crowdfunded, raising a remarkable

[89] *R (Shepherd (On Behalf of 999 Call NHS)) v National Health Service Commissioning Board* [2018] EWHC 1067 (Admin); [2018] PTSR 1900.

[90] *R (Jennifer Shepherd (On Behalf of 999 Call NHS)) v National Health Service Commissioning Board and others* [2018] EWCA Civ 2849; [2019] WLR(D) 7.

[91] *Khurana v North Central London Clinical Commissioning Group and anor* [2022] EWHC 384 (Admin); for the crowdfunding, see NHS PATIENTS, 'Stop our GP practices being sold off to Centene USA' (CrowdJustice, 2021) <https://www.crowdjustice.com/case/stop-our-gp-practices-being-sold-off-to-centene/>.

[92] Molly Blackall and Libby Brooks, 'Reclaim These Streets: Sarah Everard vigil evolves into virtual and doorstep protests' *The Guardian* (London, 13 March 2021) <https://www.theguardian.com/uk-news/2021/mar/13/reclaim-these-streets-sarah-everard-vigil-evolves-into-virtual-and-doorstep-protests>.

[93] Molly Blackall, 'Sarah Everard: Reclaim These Streets cancels its south London vigil' *The Guardian* (London, 13 March 2021) <https://www.theguardian.com/uk-news/2021/mar/13/sarah-everard-vigil-in-south-london-cancelled-organisers-say>.

[94] *Leigh and ors v Commissioner of the Police of the Metropolis and anor* [2021] EWHC 661 (Admin).

£37,270 in a matter of hours.[95] Absent the vigil proceeding, the organisers fundraised for women's causes, raising £552,132 to date and exceeding the initial £320,000 target, donating the sum to the charitable Rosa Fund.[96] The coalition also brought a full judicial review claim against the Metropolitan Police's handling of the vigil, raising £44,995 through crowdfunding, albeit over a much longer period of time.[97] In March 2022, the Police's conduct was found unlawful in preventing the organisation of the vigil, in affording insufficient consideration to Article 10 and 11 rights.[98] In a starkly-worded decision in April 2022, Warby LJ and Holgate J also refused the Police permission to appeal to the Court of Appeal.[99] This coalition makes for a compelling inclusion within this category of crowdfunded litigant. As noted in Chapter Two, this category involves inexperienced litigants bringing nationally-relevant claims, often in politically contentious areas, and sometimes raising outlying sums of money. This claim is not an 'outlier' case financially, but was highly newsworthy and contributed to a fractious and fast-moving national political environment, as Chapter Eight discusses. The 'litigation coalition' itself was relatively short-lived, as Harlow and Rawlings indicate is often the case in such collective grievances –[100] accordingly, their website appears to have lapsed.[101] Indeed, this campaign is perhaps best approached as a 'movement' rather than an ongoing policy campaign, existing as a Twitter hashtag (#ReclaimTheseStreets) capturing the state of national feeling – although the issues underpinning the grievance are of course all too entrenched and prevalent. In these ways – capturing the national mood and engaging national policy at a certain time, but appearing ephemeral as an ongoing campaign, alongside the litigation inexperience of its

[95] Jessica Leigh, 'Help us to Reclaim These Streets!' (CrowdJustice, 2021) <https://www.crowdjustice.com/case/reclaimthesestreets/>.

[96] Reclaim These Streets, 'ReclaimTheseStreets' (JustGiving, 2021) <https://www.justgiving.com/fundraising/reclaimthesestreets>.

[97] Jamie Klingler, 'Defending our right to protest and reclaim these streets' (CrowdJustice, 2021) <https://www.crowdjustice.com/case/defending-our-right-to-protest/>.

[98] *Leigh and ors v Commissioner of the Police of the Metropolis and anor* [2022] EWHC 527 (Admin); [2022] 4 All ER 796.

[99] *Leigh and ors v Commissioner of the Police of the Metropolis and anor* CO/919/2021 <https://www.bindmans.com/uploads/files/documents/Leigh_v_Commissioner_of_Police_-_appeal_judgment_-_April_2022.pdf>.

[100] Carol Harlow and Richard Rawlings, *Pressure Through Law* (Routledge 1992), 120-121.

[101] 'Reclaim These Streets' <https://reclaimthesestreets.com/> unable to access site as of 9 June 2023.

campaigners – Reclaim These Streets neatly represents an illustrative and theoretically rich case within this typological category.

Established civil society organisations:

i) Joint Council for the Welfare of Immigrants (JCWI) challenging the 'Right to Rent'

In this category, the first case study selected was the JCWI's judicial review challenging the 'Right to Rent'. The organisation crowdfunded for this litigation across two pages in 2017 and 2018, raising respectively £5,090[102] and £4,043.[103] This campaign was selected given its rightness of fit as a typical case within the category. First, the JCWI is a repeat player litigant, bringing strategic litigation on immigration law and policy matters as a longstanding specialised policy voice advocating for a fair and just immigration system.[104] It has a professionalised workforce devoted to, inter alia, legal strategy, policy, public affairs and campaigns, communications, engagement and membership, and a stable membership and funding base which predates and is distinct from any crowdfunding campaign. The Right to Rent scheme itself was introduced under the Immigration Act 2014, with powers augmented by the Immigration Act 2016, as part of the 'Hostile Environment' measures aimed at deterring 'illegal' migrants from migrating to or, if already here, remaining resident in the UK. Private landlords are required to check the immigration status of current and prospective tenants to ensure they are legally resident in the country, and failure to do so carries threat of criminal sanctions for the landlord.[105] To date, it has only been implemented in England. The JCWI challenged the policy on the basis that it causes landlords to commit nationality and race discrimination against those entitled to rent, disadvantaging them vis-à-vis white British citizens when seeking accommodation. It sought a declaration that the relevant sections of the Immigration Act 2014 were incompatible with Articles 8 and 14 of the European Convention of Human Rights;[106] and to either quash the Home Office's decision to extend the scheme to

[102] Joint Council for the Welfare of Immigrants, 'Challenge the expansion of landlord immigration checks' (CrowdJustice, 2017) <https://www.crowdjustice.com/case/right-to-rent/>.

[103] Joint Council for the Welfare of Immigrants, 'Stop Sajid Javid expanding Theresa May's hostile environment.' (CrowdJustice, 2018) <https://www.crowdjustice.com/case/hostileenvironment/>.

[104] See *Annual Review 2016-17* (Joint Council for the Welfare of Immigrants, 2017) <https://www.jcwi.org.uk/Handlers/Download.ashx?IDMF=3c9aa00a-9660-45cd-abfe-07b05bfb5b96>.

[105] Kim McKee et al, 'Redrawing the border through the 'Right to Rent': Exclusion, discrimination and hostility in the English housing market' (2021) 41(1) Critical Social Policy 91, 92-93.

[106] Human Rights Act 1998, s 4.

the rest of the UK, or to declare that extending the scheme without further evaluation of discriminatory impact would breach the public sector equality duty,[107] and would be irrational.[108] The case is illustrative of the typological category, with JCWI targeting a systemic policy, challenging the Home Office, and seeking effects at the national level. The case was successful at the High Court,[109] but the Court of Appeal allowed the Home Office's appeal –[110] again, the case's comprehensive lifecycle can be studied, providing a rich case for heuristic knowledge generation.

ii) the3million and the Open Rights Group challenging the Immigration Exemption

The second case selected in this category is the challenge to the lawfulness of the Immigration Exemption contained within the Data Protection Act 2018, brought by two civil society groups, the3million and Open Rights Group (ORG). Both groups represent typical claimants within this category, as repeat litigants bringing strategic litigation, that employ some professionalised staff. For the3million, a group campaigning for the rights of EU citizens in the UK after Brexit,[111] established following the Brexit referendum vote, this was their first judicial review claim. They have, though, since become a repeat litigant in the policy space (through crowdfunded claims), unsuccessfully challenging the alleged disenfranchisement of UK-based EU citizens in the 2019 European Parliament elections at the High Court,[112] being refused permission to bring a challenge to the EU Settlement Scheme,[113] and intervening in the Internal Market Authority's successful challenge to the Settlement Scheme.[114] As for ORG, a digital rights campaign organisation established in 2005,[115] its wide-ranging litigation experience

[107] Equality Act 2010, s 149.

[108] *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2019] EWHC 452 (Admin) [2019] WLR(D) 149, Spencer J at [35].

[109] ibid.

[110] *R (Joint Council for The Welfare of Immigrants) v Secretary of State for the Home Department* [2020] EWCA Civ 542; [2021] WLR 1151.

[111] 'Our Story' (the3million) <https://the3million.org.uk/our-story>.

[112] *R (the3million Ltd and ors) v Minister for the Cabinet Office* [2021] EWHC 245 (Admin).

[113] *R (The 3Million Ltd) v Secretary of State for the Home Department* [2021] EWHC 1159 (Admin).

[114] *R (Independent Monitoring Authority for the Citizens' Rights Agreements) v Secretary of State for the Home Department* [2022] EWHC 3274; [2023] 1 WLR 817.

[115] 'Who We Are' (Open Rights Group) <https://www.openrightsgroup.org/who-we-are/>.

dates further back than the3million, acting as an applicant,[116] or intervener,[117] in various litigation contexts, including as an intervener in several judicial reviews.[118] In the Immigration Exemption claim itself, the Exemption was argued to breach Article 23 of the General Data Protection Regulation 2016/679 and the Charter of Fundamental Rights of the European Union. Though unsuccessful in the Administrative Court,[119] the claimants won in the Court of Appeal.[120] Following a further relief hearing, the Court of Appeal suspended a declaration of unlawfulness to allow the government to remedy the incompatibility in the Data Protection Act.[121] Dissatisfied with the government's attempt to do so, via a non-binding policy document, the organisations later succeeded in a separate judicial review of the implementation of relief, resulting in declaratory orders as to the Exemption's unlawfulness, suspended for a short period for the government to introduce compliant legislation.[122] Clearly, then, the claim – a challenge to a piece of legislation within the remit of both organisations' policy expertise and part of their respective ongoing strategies – is an appropriate selection for the category. As regards the crowdfunding effort, the organisations fundraised across two pages – for the High Court and Court of Appeal stages respectively – raising £40,300,[123] and £21,710.[124]

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[116] *Big Brother Watch and ors v United Kingdom* [2018] ECHR 722.

[117] See for instance *Lloyd v Google LLC* [2021] UKSC 50; [2022] 2 All ER 209; *Cartier International AG and ors v British Telecommunications Plc and anor* [2018] UKSC 28; [2018] 4 All ER 373.

[118] See for instance *R (British Telecommunications Plc and anor v Secretary of State for Business, Innovation and Skills* [2011] EWHC 1021 (Admin); [2011] ECDR 16; *Secretary of State for the Home Department v Davis MP and ors* [2015] EWCA Civ 1185; [2016] HRLR 1.

[119] *R (Open Rights Group and anor) v Secretary of State for the Home Department and anor* [2019] EWHC 2562 (Admin); [2020] WLR 811.

[120] *R (Open Rights Group and anor) v Secretary of State for the Home Department and anor* [2021] EWCA Civ 800; [2021] 1 WLR 3611,

[121] *R (Open Rights Group and anor) v Secretary of State for the Home Department and anor* [2021] EWCA Civ 1573; [2021] WLR(D) 548. For discussion, see David Erdos, 'The UK GDPR, the Immigration Exception and Brexit: Interrogating *Open Rights Group v Secretary of State for the Home Department* and its Aftermath' (2023) 86(3) MLR 785.

[122] *R (the3million and anor) v Secretary of State for the Home Department and anor* [2023] EWHC 713 (Admin); [2023] WLR(D) 158, Saini J at [76].

[123] the3million, 'Remove the immigration exemption from the Data Protection Bill' (CrowdJustice, 2018) <https://www.crowdjustice.com/case/immigrationexemption/>.

[124] the3million, 'Remove the immigration exemption from the Data Protection Act: Part II' (CrowdJustice, 2019) <https://www.crowdjustice.com/case/immigrationexemption2/>.

The case studies selected, then, each represent a claim richly illustrative of the relevant typological category. Though not intended or explicitly accounted for when selecting the cases, each category happens to contain one claim which, on a narrow view of 'success' limited to an eventual victory in court, was ultimately successful – CARA, Reclaim These Streets, and the3million/ORG – and one which was unsuccessful – Up the Elephant, 999 Call, and JCWI. Though the impact of litigation is not central to the research question, these different results further diversify the range of experiences with crowdfunding. In an exploratory study amid an undernourished field of study, this heterogeneity of stories and experiences is valuable indeed.

Methods

This section discusses the methods employed within the multiple-case study phase of research. The method for the quantitative stage was discussed separately in Chapter Two, given that it is a preliminary phase in the sequential design – notwithstanding that it has of course influenced the case selection strategy. Webley notes that case study research incorporates multiple methods to 'generate a spectrum' of data which 'when triangulated provide a means through which to draw robust, reliable, valid inferences about law in the real world.'[125] Multiple methods enrich the quality and nuance of research, while enabling greater confidence in its rigour through methodological triangulation. Where data generated across methods corroborate, this increases the likelihood that findings are credible and the representation of the phenomenon and the views of participants is fair.[126]

Qualitative interviews

The primary method here is qualitative semi-structured interviews with stakeholders in each case study. While the interview method is sometimes adopted uncritically in qualitative research,[127] it is appropriate in this project given the research questions' aim to understand legal mobilisation processes from the perspective of the campaigners themselves. This 'bottom-up' focus demands a method enabling the researcher to access the understandings of relevant stakeholders – interviews yield uniquely privileged insights into participants' lived experiences

[125] Webley (n 33), 2.

[126] Norman K Denzin, *The Research Act* (2nd edn, McGraw-Hill Book Company 1978), 301.

[127] Paul Atkinson and David Silverman, 'Kundera's *Immortality*: The Interview Society and the Invention of the Self' (1997) 3(3) QI 304, 310.

of crowdfunding and legal mobilisation, and their interpretations of these phenomena.[128] These interpretations are subjective, and may offer different and even contradictory accounts, adding nuance and richness – such complexities can be analysed in light of findings across sources.[129]

Interviews ranged in length from 15 minutes to 1 hour and 45 minutes, conducted with a range of stakeholders including participants internal to the organisations involved in the case, such as campaigners, policy teams, and communications officers – the types of roles depended of course on the relative formalisation of each group, differing across typological categories. It also included relevant external parties in the judicial review, particularly groups' solicitors and barristers, and some external advisors. Representatives of other parties in each judicial review were also invited for interview, such as legal representatives of defendant public bodies, interveners, and interested parties. The research initially planned to also target donors to the relevant crowdfunding campaigns, a population that has not yet been accessed in the litigation crowdfunding literature. After initial discussions with some campaigners as to the potential to access donors, though, it became apparent that this would be difficult in practice. Accordingly, this was not pursued, meaning that particular group of actors in the process were not represented.

To provide some structure, interview guides were developed and employed, tailored to the type of stakeholder, for instance campaigners or lawyers. These guides provide the same starting point across the interviews, focused on common topics, but acknowledge interview content will vary based on the participant's responses and interviewer's subsequent follow-up questions.[130] The guides list questions based partly on deductive themes derived from the literature, and pursue the information required to address the research question. When structuring the interview guide, it was in most cases logical to order the questions straightforwardly chronologically, covering the full lifecycle of the case and its impacts; often, having covered the specific claim, a series of questions would then capture participants' perceptions more generally of the operation of crowdfunding. Introductory questions were phrased in open rather than closed terms,[131] allowing participants to narrate in-depth which

[128] Steinar Kvale, *Doing Interviews* (SAGE 2007), 10-11.

[129] Kerry Chamberlain et al, 'Pluralisms in Qualitative Research: From Multiple Methods to Integrated Methods' (2011) 8(2) Qualitative Research in Psychology 151.

[130] Kathryn Roulston, *Reflective Interviewing: A Guide to Theory and Practice* (SAGE 2010), 15.

[131] Kvale (n 128), 60.

experiences were important to them and detail their accounts, in relation to the core topic.[132] As such, the participant helps determine the way into studying the phenomenon by generating the narrative in the early stages.[133] Following these open questions, more specific questions were used, where relevant, to probe interesting observations.[134] To a degree, this relied on active listening skills during the interview itself, to recognise if core research topics have been addressed and whether it is appropriate to probe further,[135] as well as responsiveness to depart from the guide's structure where participants raised intriguing or surprising comments of potential relevance to the research question. This requires, then, 'an ear for the theme' and what the interviewer 'wants to ask about', and 'a sensitivity towards the social relationship of an interview'.[136] That said, it was possible to plan some bespoke follow-up questions at points of the interview guide anticipated to particularly benefit from extended questioning. Appendix A shows a sample interview guide for campaigners (anonymised rather than associated with a specific case study).

Participants were recruited in each case having been identified as important and relevant stakeholders based on surveying publicly accessible information such as groups' websites, social media feeds, and crowdfunding pages, alongside the judicial review judgments. As with the broader selection strategy, then, recruitment was pragmatic and purposeful in nature, identifying those appearing most relevant to addressing the research questions. The primary form of contact was by email, usually sending an initial email to the group's account explaining the project and asking whether they might wish to participate. Once group members indicated willingness to participate, relevant lawyers and other parties, such as representatives of intervening organisations and defendants, were also contacted for interview. Snowball sampling was also relied upon,[137] using participants' knowledge to access those less easy of access to the researcher,[138] and 'utilizing the networks between key people' in the case's

[132] Anne Galletta and William E Cross, *Mastering the Semi-Structured Interview and Beyond: From Research Design to Analysis and Publication* (NYU Press 2013), 47-48.

[133] ibid 48.

[134] Kathryn Roulston and Myungweon Choi, 'Qualitative Interviews' in Uwe Flick (ed), *The SAGE Handbook of Qualitative Data Collection* (Sage 2018), 237.

[135] Roulston (n 130), 15.

[136] Kvale (n 128), 63-64.

[137] Nicholas Walliman, *Social Research Methods* (Sage 2006), 79.

[138] Ian Shaw and Sally Holland, *Doing Qualitative Research in Social Work* (SAGE 2014), 87.

universe.[139] A question was thus included toward the end of the interview guide asking 'Is there anybody else you feel would be good to speak to about this?', and whether they would be able to inform those people about the research and provide an introduction. This yielded several additional interview opportunities.

A common question in qualitative research – indeed, a common worry among newer researchers – concerns whether a study's sample size is sufficiently big.[140] Rarely, if ever, will the question be whether a sample size is too big, of course, although a sample size larger than necessary, where accuracy gains are small in view of the additional use of participants' time, might be said to be ethically problematic.[141] It is perhaps trite, but nonetheless accurate, to note qualitative research's different sampling logic informs the approach to the legitimacy of sample size. Rather than seeking generalisation to the population and statistical representativeness, qualitative work prioritises information-richness and insight,[142] rendering a large sample size less important for trustworthiness than the detail in each participant's account. The overall sample size here is 38, and Figure 10 stratifies this per case and by participants' roles in each case.

Figure 10: case study participants

Case	**Sample (*n*)**	**Roles of Participants**
Up the Elephant	7	Campaigners (3); claimant lawyers (3); defendant lawyer (1)
CARA	6	Group members (3); claimant lawyers (2); defendant lawyer (1)
999 Call	6	Campaigners (4); claimant lawyers (2)
Reclaim These Streets	3	Campaigner (1); claimant lawyers (2)

[139] Teresa Morris, *Social Work Research Methods: Four Alternative Paradigms* (SAGE 2006), 93.

[140] Karen M Staller, 'Big enough? Sampling in qualitative inquiry' (2021) 20(4) Qualitative Social Work 897.

[141] Chittaranjan Andrade, 'Sample Size and its Importance in Research' (2020) 42 Indian J Psychol Med 102, 102.

[142] Tim Guetterman, 'Descriptions of sampling practices within five approaches to qualitative research in education and the health sciences' (2015) 16(2) FQS 25 <https://doi.org/10.17169/fqs-16.2.2290>.

Right to Rent	9	Campaigners for JCWI (2); claimant lawyers (2); campaigner for intervening group (1); lawyers for intervening groups (3); researcher (1)
Immigration Exemption	6	Campaigners (3); claimant lawyers (2); lawyers for intervener (1)
Miscellaneous	2	CrowdJustice Staff (1); core repeat crowdfunding actor (1, Jolyon Maugham KC)

A few brief points on the above are warranted. First, one lawyer acted for both 999 Call for the NHS and in the Right to Rent claim, so is accounted in both case studies' individual sample sizes, but is not double counted in the overall sample of 38. Second, the 'Miscellaneous' participants were regarded as key informants whose perspective, though not associated with a specific case study, would be useful given their wealth of experience, and unique positions, in the litigation crowdfunding field. The CrowdJustice staff member especially offered a novel perspective, from the platform used in all case studies. Third, the sample was lower than desired in two areas. In the Reclaim These Streets case study, only one campaigner was recruited, from a core team of four, alongside two lawyers, meaning the other campaigners' perspectives were not captured. As such, less emphasis is placed on this case study in the analysis – the campaigner offered highly useful insights into the litigation process which are drawn upon, but the case study is afforded the least bespoke attention, given the coverage of the case's universe is the least systematic. The other area of weakness, across many of the case studies, is a far lower proportion of defendant perspectives. This is hardly uncommon to public law research – government defendants, and their lawyers, have previously been noted to be more difficult of access and cautious to participate in research.[143] Recruitment was more difficult here, both as government employees' contact details are less publicly available, and given some reluctance among those contacted to participate. With the core research question prioritising the experiences of those mobilising law with crowdfunding, the defence perspective is, in truth, less central. A more thorough understanding of respondents' attitude towards the growth of

[143] Varda Bondy and Maurice Sunkin, *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing* (Public Law Project 2009), 12-13; Varda Bondy, Lucinda Platt and Maurice Sunkin, *The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences* (Public Law Project 2015), 7.

crowdfunding would, though, have been instructive for building the picture of crowdfunding's contribution, and the impact of crowdfunded judicial review on good government.[144] This is a representational limitation of the research.

The guiding principle used (sometimes uncritically) to justify a qualitative researcher's sample size is 'theoretical saturation' – that any new data would contribute little to the results narrative or addressing the research questions.[145] By virtue of the case study method, the population of each case study's universe, thus capable of participating, was fairly small. In all cases, albeit to varying degrees (with the Reclaim These Streets case more limited here), key accessible stakeholders capable of offering useful perspectives for the research question were interviewed. That the universe of each case is small also indicates theoretical saturation in relation to each case is likely to be reached more quickly, as is thought to be the case in relatively modest or homogenous experiences, like an individual case.[146] Furthermore, lawyers (not just defendant lawyers) are a fairly elite group, often associated with difficulties of access.[147] This account of the sample size perhaps risks sounding defensive – it should equally be emphasised that participants often provided detailed stories drawing upon their practical experience, providing a depth of meaning that goes further to satisfying qualitative research validity and richly engaging the core research questions than statistical sample size.[148] In any event, the overall sample of 38 represents a strong and robust size for qualitative social science – for instance, Thomson's review of 100 qualitative research articles using grounded theory found only 22 used samples of over 31, and the average size was 25.[149] It is not difficult to find,

[144] For excellent defendant-side discussion of judicial review, see Catherine Haddon, Raphael Hogarth and Alex Nice, *Judicial review and policy making: The role of legal advice in government* (Institute for Government 2021).

[145] Mark Mason, 'Sample Size and Saturation in PhD Studies Using Qualitative Interviews' (2010) 11(3) FQS <https://doi.org/10.17169/fqs-11.3.1428>.

[146] ibid; Emmel (n 63), 141.

[147] Robert Mikecz, 'Interviewing Elites: Addressing Methodological Issues' (2012) 18(6) QI 482, 483.

[148] Emmel (n 63), 137, 140.

[149] Stanley Bruce Thomson, 'Sample Size and Grounded Theory' (2011) 5(1) JOAAG 45, 49.

within methods literature, recommended 'adequate' samples of 25,[150] at least 15,[151] or between 20 and 30 in grounded theory.[152]

Document analysis

Document analysis naturally complements interviews as a supplementary component of mixed-method case studies – documents can enrich description, contextualise interview data, and raise questions for interviews to address.[153] The method is ideal for triangulating interview data, as documents are relatively stable information sources and data are nonreactive to researcher influence, offsetting concerns that interview data can be susceptible to response bias, wherein interviewees answer in ways they perceive the interviewer would like.[154] Supplementing stakeholder interviews with document analysis has been effective in other case studies of litigation and social movements.[155]

Yet document analysis is not simply a contextualising and triangulating tool – it is itself insightful for addressing the research question. Documents are written to enrol target audiences into particular ways of acting and of understanding the world, what is included and omitted can consolidate an author's narrative.[156] The range of documents analysed in the present research is, admittedly, small in scope, primarily comprising claimants' CrowdJustice fundraising pages (including the updates provided as the case unfolds); content on groups' websites; and the judicial review judgments. Each represents a stable information source, but is also designed with distinct communicative purposes. CrowdJustice pages seek to convince readers of a cause's legitimacy and the importance of donating, effectively in competition for donors' funds, while court judgments convey judicial authority and neutrality – the fact this is less obvious as a persuasive purpose perhaps evidences its effectiveness. Drawing out the processes by which documents propagate narrative purposes can help address the interest in research sub-question

[150] Kathy Charmaz, *Constructing grounded theory: A practical guide through qualitative analysis* (SAGE 2006), 114.

[151] Daniel Bertaux, 'From the life-history approach to the transformation of sociological practice' in Daniel Bertaux (ed), *Biography and society: The life history approach in the social sciences* (SAGE 1981), 35.

[152] John Creswell, *Qualitative inquiry and research design: Choosing among five traditions* (SAGE 1998), 64.

[153] Glenn A Bowen, 'Document Analysis as a Qualitative Research Method' (2009) 9(2) Qualitative Research Journal 27, 29.

[154] ibid 29-30; Yin (n 19), 101. On triangulation, see Lorelli S Nowell et al, 'Thematic Analysis: Striving to Meet the Trustworthiness Criteria' (2017) 16(1) IJQM 1.

[155] See for instance Vanhala and Kinghan (n 4).

[156] Tim Rapley, *Doing Conversation, Discourse and Document Analysis* (SAGE 2007), 111, 123.

(ii) of how campaigns have mobilised and enrolled support, and perhaps faced opposition during that mobilisation.

Analysis

The data collected across both methods were analysed separately. As the core method, the interview data underpin the results narrative, with observations from the documents incorporated into the narrative as a minor supplement.[157] The data were analysed through thematic analysis, affording considerable flexibility to identify and interpret patterns.[158] Themes can be developed along a continuum, being driven by theory, driven by prior research, or developed inductively from the raw data itself.[159] Here, theme development was primarily, but not solely, deductively-driven from prior research, with legal mobilisation, public interest litigation, and crowdfunding scholarship guiding the identification of themes. Considerable space was, though, left for inductive theme development – given the nascency of empirical research on crowdfunding, it was (rightly) anticipated that as-yet-unidentified patterns would emerge in the data. This is highly-valued in case study research, exemplifying its exploratory value.[160] The core themes identified in the data structure the remainder of the thesis, broadly organised across two overarching frames found in the data – crowdfunding's resource generation function (Part Two), and the difficulties associated with using crowdfunding to access law (Part Three). The five constituent chapters reflect key themes in the qualitative data.

Computer-assisted qualitative data analysis software (CAQDAS) supported analysis, with NVivo used in managing documents, transcripts, and analytical ideas.[161] Some warn that CAQDAS may mechanise and strip qualitative analysis of its richness, removing the researcher's creative role and even leading researchers to organise analysis around software's

[157] Janice M Morse, 'Simultaneous and Sequential Qualitative Mixed Method Designs' (2010) 16(6) QI 483, 486-487.

[158] Virginia Braun and Victoria Clarke, 'Using thematic analysis in psychology' (2006) 3(2) Qualitative Research in Psychology 77, 81-82.

[159] Richard Boyatzis, *Transforming Qualitative Information: Thematic Analysis and Code Development* (Sage 1998), 29, 35.

[160] Merriam (n 56), 13.

[161] Patricia Bazeley and Kristi Jackson, *Qualitative Data Analysis with NVivo* (2nd edn, Sage 2013), 3.

capabilities rather than using the technology to fulfil project goals.[162] Nevertheless, in automating and reducing time spent on routine and mechanical work, many find the software increases the researcher's capacity to focus on interpretive, creative dimensions of analysis and theory development.[163] Those clerical tasks which CAQDAS automates may, though, present opportunities for researchers to become familiar with the data.[164] Here, this was mediated by retaining other opportunities to handle the data, including manually transcribing interviews by amending the (highly imperfect) interview transcripts produced by Zoom. As such transcription and playback of the interview recording functioned as an early stage of the analysis process, maintaining 'closeness' to the data.

Ethical considerations

The study's qualitative research received ethical approval from the University of York's Economics, Law, Management, Politics and Sociology Ethics Committee,[165] and followed core ethical principles within qualitative research.[166] This chapter does not discuss every feature of the ethics application, much of which was straightforward. Three core issues demanded particular consideration in the design and implementation of research: informed consent; anonymity in case study research; and data management.

Informed consent

Participants' informed consent regarding the nature of research and potential consequences of participation is a central principle of ethical qualitative research.[167] Crucially, the consent

[162] Linda Mulcahy and Sally Wheeler, ''Couldn't You Have Got a Computer Program to Do That for You?' Reflections on the Impact that Machines Have on the Ways We Think About and Undertake Qualitative Research in the Socio-Legal Community' (2020) 47(1) J.L.Soc'y 149, 161.

[163] Ryan S Hoover and Amy L Koerber 'Using NVivo to Answer the Challenges of Qualitative Research in Professional Communication: Benefits and Best Practices Tutorial' (2009) 54(1) IEEE Transactions on Professional Communication 68, 70.

[164] Moya Morison and Jim Moir, 'The role of computer software in the analysis of qualitative data: efficient clerk, research assistant or Trojan horse?' (1998) 28(1) Journal of Advanced Nursing 106, 114.

[165] 'Economics, Law, Management, Politics and Sociology Ethics Committee' (University of York) <https://www.york.ac.uk/social-science/facilities-support/ethics/elmps-committee/>.

[166] Yvonna S Lincoln, 'Ethical Practices in Qualitative Research' in Donna M Mertens and Pauline E Ginsberg (eds), *The Handbook of Social Research Ethics* (SAGE 2009).

[167] ibid 152.

process ought, in accordance with the UK General Data Protection Regulation (UK GDPR), the retained EU law version of the EU GDPR,[168] to require participants to positively opt in, use clear and easily understandable language, and provide distinct 'granular' options to consent to different purposes and types of data processing, rather than providing a single blanket consent option to the research.[169] These considerations influenced the design of the informed consent form (shown in Appendix B) – for instance, participants could consent to be interviewed but not recorded – as one participant did. It makes clear that participants are free to withdraw consent up to three months after data collection without a reason and without being penalised. In view of the 'granular' consent options, some participants opted against their interview responses being quoted. In those instances, interviews informed the analysis and development of themes, but were not quoted.

Anonymity

Qualitative researchers often guarantee their participants anonymity, yet this is difficult to maintain in case study research, which describes specific sites in-depth.[170] Compounding this, where judicial reviews reach court, the judgments themselves contain information concerning the claimant group, and potentially individuals within the group where they have, for instance, submitted a witness statement or litigated in their own name. Meanwhile, websites associated with the case or campaign, such as CrowdJustice, may also name individuals. Some readers, then, might be able to suspect particular individuals are associated with certain interview comments. As such, the approach adopted has been to name the groups selected for study, but offer anonymity by default to the individuals themselves, attributing statements to the group, but not the specific individual. Participants, then, are cited using the convention: 'Campaigner 1, Up the Elephant', or 'Lawyer 1, CARA'. This provides individuals anonymity, however there remains the possibility of indirect identification among those with knowledge of the sector, when combined with references to documents such as the judgments. Accordingly, the informed consent form and participant information sheet made clear that, even if participants remained anonymised, it may be difficult to fully prevent indirect identification. The level of risk here is ultimately low – even in the event of indirect identification, interview data were not

[168] Data Protection Act 2018, ss 3(10) and 205(4).

[169] 'Consent' (Information Commissioner's Office) <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/lawful-basis/a-guide-to-lawful-basis/lawful-basis-for-processing/consent/>.

[170] Merriam (n 56), 182.

sensitive or likely to attract unwelcome attention,[171] lessening the impact of identification. Participants were nonetheless alerted to the possibility in advance, to ensure consent was ethical and genuinely informed, and to allow participants to assess whether, for instance, to refrain from making certain comments or decline to be quoted.

At the other end of this dynamic, the consent form offered the option to waive anonymisation and identify participants in the research, as participants might approach involvement in the research as an opportunity to raise awareness and want to be named. However, research methodology is an evolving matter, and the decision was made when generating the results narrative not to name those who did suggest anonymity could be waived. This was because naming those participants might increase the risk of others in the relevant case study, who had not consented to waiving anonymity, being indirectly identifiable by process of elimination.

A further concern may be that, while documents such as judicial review judgments and CrowdJustice pages are already open to public access and scrutiny irrespective of this research, and the interviews were not anticipated to generate any personal data beyond what has been disclosed in documents like the CrowdJustice page, there could still be a residual risk of disclosing more personal information. Had this arisen, this was to be handled reflexively with care, for instance redacting information from the interview transcript or refraining from quoting. Equally, though new information from interviews was unlikely to subject participants to unwelcome publicity, analysis of publicly available documents, combined with new data, may reveal previously unidentified associations. The risk is again low, but this informed the decision to offer individuals anonymity. In approaching these issues, then, this study has committed to the practice of situational ethics, informed by an overarching commitment to avoid harm to participants when processing data, but going beyond such general edicts to continually reflect on and critique, throughout the fieldwork and analysis, the ethics of the means of research and use of data in each case's circumstances.[172] The right to withdraw from the study, expressly identified in the consent form and information sheet, provided participants the opportunity, over three months, to reflect on their continued consent to the various

[171] For discussion of unwelcome attention, see Merriam (n 56), 182.

[172] Sarah J Tracy, 'Qualitative Quality: Eight "Big-Tent" Criteria for Excellent Qualitative Research' (2010) 16(10) QI 837, 847.

provisions of the study having been interviewed. The informed consent process has, then, proven key in ensuring personal data is handled appropriately.

Data management

The research data fall within the remit of the UK GDPR, and the Data Protection Act 2018. Participants' contact details – their names and email addresses – squarely constitute personal data per the GDPR, however no special category data was identified under the GDPR. Participant email addresses and names were collected and stored safely, to invite them to participate and set up interviews. These were kept in a master list stored in a password-protected file on the researcher's personal filestore on the University server, and destroyed once interviews were completed. Importantly, the email addresses were stored in a separate folder to the interview data on the filestore. The filestore was accessed only through a University computer or from the researcher's password-protected personal laptop – in the latter case, using the University's Virtual Desktop Service,[173] which is secured using the Parallels Client secure server. Access to the Desktop Service requires Duo two-factor authentication, using a One Time Passcode sent to the researcher's mobile phone. Though the researcher's laptop was used to remotely access the filestore, no data were stored on the personal laptop itself. Had the decision been made to name participants who waived anonymity, those participants' names would have been retained on the secure list – given the ultimate decision not to name those who waived anonymity, names were not stored.

The handling of interview recordings also requires consideration. Where participants consented, both in the consent form and when asked again at the start of the interview, interview audio – but not video – was recorded using Zoom's in-built recording function. Zoom also produced an audio transcript. The recording and transcript were stored within Zoom's online cloud storage, accessible only through the researcher's University-affiliated, password-protected Zoom account. Cloud recordings are stored encrypted by Zoom.[174] The anonymised audio recordings and Zoom-generated transcripts were also transferred from the encrypted Zoom cloud storage to the secure University server, so that transcripts could be manually edited using Microsoft Word on the filestore. The files were saved using anonymised naming conventions, as indicated above, such as 'Campaigner_1_999_Call', while transcripts and

[173] 'VDS: Virtual Desktop' (University of York) <https://www.york.ac.uk/it-services/services/vds/virtual-desktop/>.

[174] 'Security at Zoom' (Zoom) <https://zoom.us/trust/security>.

audio recordings were stored in separate folders on the filestore. The audio recordings – on both Zoom and the filestore – were deleted once the transcripts were fully transcribed. The thematic analysis using NVivo was also produced entirely on the University filestore, accessed either via a University computer or from a personal laptop through the Virtual Desktop Service. The anonymised transcripts were imported onto NVivo, a platform which requires a password-protected login. Finally, where participants actively consented, anonymised transcripts will be deposited in the Research Data York archive at the project's conclusion,[175] to be stored compliantly with University data management policy and legal requirements.

Conclusion

This chapter has outlined the methodology and research process grounding the subsequent analysis chapters. It has indicated the value to the research design of a socio-legal orientation, which highlights the co-constitutive nature of law and social action, and nonlegal actors' experiences of law – both of which usefully frame the study's focus on campaign groups' use of litigation and litigants' turn to crowdfunding. The chapter situated the thesis' multiple-case study approach within qualitative social science – including political science scholarship, a discipline exerting a formative influence on legal mobilisation research – and has justified the case study strategy in addressing the core 'how' question embedded in the research design, namely, how crowdfunding affects social actors' experiences of legal mobilisation.

Underpinned by this research design and paradigm, the chapter then detailed the selection of six cases as the objects of study, utilising the novel typology of crowdfunded legal mobilisation actors theorised in Chapter Two, to richly engage the research questions. The multiple qualitative methods facilitating in-depth analysis of the case studies, 38 semi-structured interviews supplemented by some document analysis, were then addressed, as well as the mode of thematic analysis and key ethical considerations. These qualitative methods – especially the interviews – underpin the five forthcoming analysis chapters, split across Parts Two and Three of the thesis. These chapters have been structured according to the core thematic patterns observed in the data.

[175] 'Research Data York' (University of York) <https://www.york.ac.uk/library/research-creativity/research-data-york/>.

Part II

Chapter Four: The Material Routinisation of Crowdfunding in the Patchwork of Judicial Review Funding

Introduction

Crowdfunding is, so goes a dominant framing in much discussion by credible commentators and academics, a disruptive force in public law litigation characterised by risk and overt politicisation. The introductory chapter has indicated the degree to which this narrative frame has taken hold. Horne suggests crowdfunding 'threaten[s] to drag the courts into the political arena more than is strictly necessary'.[1] Tomlinson, who saw fit in the title of his article to regard crowdfunding as 'a risky new resource', voices concern that the resource may depart from the norms and 'craft' of public interest litigation, with its capacity for poorly-handled litigation by diversified claimants supported by donors ill-equipped to vet the merit of claims.[2] McCorkindale and McHarg share this view, suggesting lay donors may part with money in high-profile contexts like Brexit based less on claims' merits than on emotional and political preferences.[3] Even Jolyon Maugham KC has warned of the ethical risks, and potential for high-profile scandal, associated with crowdfunding and its relationship to a given audience's policy ambitions.[4]

This chapter tells a remarkably different story of crowdfunding, a story of its stark routinisation within the public interest litigation field. This is not to say the concerns above are not worth taking seriously, or to deny that crowdfunding brings weighty risks – even if it has become a routine feature of litigation, crowdfunding may still carry risk and disrupt the practice of public interest litigation. Rather, it is to capture a dimension of the issue that those discussions do not account for and which a frame of disruption omits. Assessment of (the scale

[1] Alexander Horne, 'Why crowdfunding legal cases is a recipe for disaster' *Prospect* (London, 20 April 2022) <https://www.prospectmagazine.co.uk/politics/why-crowdfunding-legal-cases-is-a-recipe-for-disaster>. All webpages in this chapter last accessed 11 September 2023 unless otherwise stated.

[2] Joe Tomlinson, 'Crowdfunding public interest judicial reviews: a risky new resource and the case for a practical ethics' [2019] PL 166, 181.

[3] Christopher McCorkindale and Aileen McHarg, 'Litigating Brexit' in Oran Doyle, Aileen McHarg, and Jo Murkens, *The Brexit Challenge for Ireland and the United Kingdom: Constitutions Under Pressure* (CUP 2021), 288.

[4] Jolyon Maugham KC, 'Is crowdfunding the next mis-selling scandal?' *Law Society Gazette* (London, 20 July 2020) <https://www.lawgazette.co.uk/practice-points/is-crowdfunding-the-next-mis-selling-scandal/5105038.article>.

of) risk and disruption ought to be underpinned and contextualised by a more sophisticated understanding of what crowdfunding is actually used for in public interest litigation costs and funding, which in-depth qualitative can provide. Drawing on the case studies, the chapter indicates that the disruptive emphasis may be overstated – crowdfunding appears to have been incorporated relatively smoothly into ordinary practice, although this of course does not mean the resource is without risk. It emphasises that crowdfunding is but one feature – an important one, certainly – of a wider patchwork of opportunity structures and resources which claimants can utilise in a landscape otherwise largely hostile to legal mobilisation. It interacts fruitfully with costs-capping agreements, but also relies on claimant lawyers being willing to work on discounted rates. Contrary to the picture perhaps conjured by coverage of high-profile cases, crowdfunding appears rarely sufficient on its own to enable legal mobilisation, but is dependent on the other features of the patchwork to supplement it. In these ways, the chapter articulates crowdfunding's complex role as a 'material resource' providing money to facilitate mobilisation.[5]

The chapter proceeds as follows. First, it articulates the interaction between crowdfunding and costs-capping, in both environmental and non-environmental claims, arguing the dynamic is central to crowdfunding's role in legal mobilisation and is increasingly routinised. Crowdfunding appears both dependent on costs-capping to be effective, and can make costs-capping more palatable to judges and defendants. Second, it discusses crowdfunding's contested relationship with legal aid, noting crowdfunding is a necessary stopgap following legal aid cutbacks, but may also politically 'prop up' the perception of a system that does not need more systematic funding. Third, it indicates claimant lawyers may, in practice, often need to be flexible on fees for crowdfunded claims to proceed. Fourth, it addresses an issue often raised as a transparency concern – what happens to crowdfunds when cases succeed and are well-funded? In the two case studies where claimants had funds remaining after litigation, the funds were, it argues, used incredibly sensibly, offering a different tale of unused funds than a common narrative. Finally, it contextualises the bottom-up innovation of crowdfunding in view of the current hostilities facing legal mobilisation from executive and judicial system designers, tentatively suggesting crowdfunding may add to the elite image of polycentric judicial review needing pushback. In this way, judicial review procedure and practice are elastic – as some doors for mobilisation open, others may close. In

[5] Mark Aspinwall, 'Legal mobilization without resources? How civil society organizations generate and share alternative resources in vulnerable communities' (2021) 48(2) J.L.Soc'y. 202, 209.

sum, then, the dominant frame advanced by some, that crowdfunding facilitates unduly easy access to judicial review for politically motivated litigation, may well be radically overstated.

Crowdfunding and costs protection

The core function of crowdfunding, participants across case studies agreed, is to provide adverse costs protection to cover costs of defendants and interested parties in the event the claimant loses. As such, and given that crowdfunding often raises relatively modest sums, per Chapter Two, the relationship between crowdfunding and costs protection is key in facilitating access to judicial review. This section explores the connection between crowdfunding, costs, and costs protection in practice, a dynamic interplay wherein groups' resource mobilisation supplements, and is bolstered by, the existing legal opportunity structures for access to justice. It argues that, for the most part, the interaction is relatively clear, well-understood, and increasingly routinised.

Judicial review's financial exclusions

Judicial review is, as outlined previously, an expensive discipline. The costs risk – and the uncertainty of that risk – deters many claimants from proceeding with cases, which Tom Hickman KC has memorably, and rightly, labelled 'public law's disgrace'.[6] Hickman estimated the adverse costs where a claimant lost a 'very simple two hour judicial review claim against a government department' would be £8,000-12,000; a one-day 'moderately complex' claim challenging a regulatory body would exceed £40,000, and a substantial two-day challenge would reach £80,000-£200,000.[7] This can be a frightening prospect indeed for those mobilising judicial review; for all its theoretical value as an accountability mechanism, the process risks only being available in practice to those with monetary resource. It is little wonder, then, that one prominent criticism of litigating for social change is that court access disproportionately benefits privileged interests,[8] with civil society on the wrong side of this power imbalance.[9] In

[6] Tom Hickman KC, 'Public Law's Disgrace' (UK Constitutional Law Association, 9 February 2017) <https://ukconstitutionallaw.org/2017/02/09/tom-hickman-public-laws-disgrace/>.

[7] ibid.

[8] Richard Bellamy, 'The democratic constitution: why Europeans should avoid American style constitutional judicial review' (2008) 7(1) EPS 9.

[9] Lisa Vanhala, 'Civil Society Organisations and the Aarhus Convention in Court: Judicialisation From Below in Scotland?' (2013) 49(3) Representation 309, 317-318.

the UK, there has generally been a dearth of independent funding for strategic litigation, particularly vis-à-vis countries like the USA.[10] As one lawyer in the Right to Rent case study noted, "we don't have progressive billionaires funding cases", progressive funding organisations do not "get involved in funding large numbers of cases", and charities are often restricted from "spend[ing grant funds] on litigation-style campaigning" (Lawyer 1, National Residential Landlords Association (NRLA)). Rights advocates have thus tended to rely on state legal aid provision. Notwithstanding that this is increasingly difficult to achieve for strategic litigation, reliance on legal aid funding can also exert governmental constraints on progressive lawyering.[11] Reliance on government assistance and grants may lessen control over strategies and independence, and increase 'susceptibility to political intimidation', hindering strategic challenges to public bodies.[12] Harlow and Rawlings note organisations receiving government grants may, fearing funding cuts, become more hesitant to litigate against those grant-making bodies, observing that the Law Centres have on multiple occasions experienced local authority grant-funding at risk for this very reason.[13]

On a note of hope, Kinghan argues new resource streams may alleviate some of these constraints: progressive grant-making bodies encouraging social reform litigation, and crowdfunding.[14] The latter might provide funds more urgently and time-sensitively than grant-making bodies. Amid a difficult funding landscape and high costs risk, participants across case studies acknowledged that many of their claims could not have proceeded without crowdfunding. As Chapter Two revealed, most legal mobilisation activity using crowdfunding involves those outside the 'usual suspect' repeat player NGOs. As an ad hoc, case-by-case means of fundraising, crowdfunding may erode some of the resource mobilisation deficits facing one-shotters. While some repeat players may of course stand in better stead to fundraise, given social capital advantages, one-shotters can access finance from communities in a democratised manner, both from their core base and potentially further afield. The case studies

[10] Charles Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press 1998), 141-142.

[11] Richard Moorhead, 'Third Way Regulation? Community Legal Service Partnerships' (2001) 64(4) MLR 543, 559.

[12] Catherine R Albiston and Laura Beth Nielsen, 'Funding the Cause: How Public Interest Law Organizations Fund Their Activities and Why It Matters for Social Change' (2014) 39(1) L.& Soc.Inquiry 62, 63, 75.

[13] Carol Harlow and Richard Rawlings, *Pressure Through Law* (Routledge 1992), 118.

[14] Jacqueline Kinghan, *Lawyers, Networks and Progressive Social Change: Lawyers Changing Lives* (Hart Publishing 2021), 14.

provide weighty evidence that, amid limitations with state and other funding routes, crowdfunding is becoming an increasingly routinised and important part of the (uneven) funding patchwork for mobilising judicial review, interacting with costs protection and costs-capping both in the environmental and non-environmental contexts.

Aarhus Convention claims

A judicial review claim (or a claim under some statutory review processes)[15] that addresses matters relating to the environment or planning will be eligible for bespoke costs protection under the Civil Procedure Rules,[16] provided it falls within the scope of Articles 9(1)-(3) of the international Aarhus Convention, to which the UK is a signatory.[17] Under these 'Aarhus costs rules', an unsuccessful claimant's liability for paying the other side's costs is limited to £5,000, or £10,000 for a group claimant. The costs-cap is reciprocal but non-mirrored – an unsuccessful claimant can recover up to £35,000 from the defendant. The government introduced these rules to implement the Aarhus Convention's requirement that access to environmental justice is 'not prohibitively expensive'.[18] It did so under pressure from campaigners and supranational institutions,[19] especially a contemporaneous reference from the European Commission to the Court of Justice of the European Union, which the government (rightly) anticipated would declare it had inadequately implemented the 'not prohibitively expensive' requirement.[20]

Both the Up the Elephant and Croyde Area Residential Association (CARA) case studies concerned planning law matters and adverse costs risk at the High Court was limited, respectively, to £5,000 and £10,000, with the other side's liability capped at £35,000 in both. The cap in the Up the Elephant claim increased to £10,000 for the Court of Appeal stage, while

[15] Appeals under Town and Country Planning Act 1990, s 289(1) and Planning (Listed Buildings and Conservation Areas) Act 1990, s 65(1). Other routes, including under TCPA 1990, s 288, are excluded – see *Venn v Secretary of the State for Communities and the Local Government* [2014] EWCA Civ 1539. For comment, see Gayatri Sarathy, 'Costs in Environmental Litigation' (2015) 27(2) JEL 313.

[16] CPR 45.41-44.

[17] UNECE, *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (Aarhus, 25 June 1998) <https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>.

[18] ibid, Art 9(4).

[19] For discussion, see Lisa Vanhala, 'Shaping the Structure of Legal Opportunities: Environmental NGOs Bringing International Environmental Procedural Rights Back Home' (2018) 40(1) Law and Policy 110.

[20] 2014: Case C-530/11 *European Commission v United Kingdom of Great Britain and Northern Ireland* [2014] ECR-0000.

CARA's cap would have been renegotiated had the interested party not withdrawn its appeal to the Court of Appeal. Crowdfunding played an important role in both claimants' capacity to meet a costs-cap, protecting the individuals involved from liability for adverse costs if unsuccessful. Up the Elephant fundraised £11,753 from 442 individual pledges, across two fundraising pages –[21] Chapter Two demonstrates this is an average sum to raise, yet it was only narrowly sufficient to meet the cap at the Court of Appeal, without accounting for claimant lawyers' fee arrangements, discussed later. This emphasises the precarity often facing claimants, even protected by crowdfunding and the Aarhus regime.

We can further understand how crowdfunding supplements the Aarhus regime by considering the pre-action process for applying the Aarhus cap. A claimant must indicate on the claim form, when filing for judicial review, if they regard it as an Aarhus claim.[22] Alongside the claim form, they must provide a schedule of significant assets, liabilities, income and expenditure, and the aggregate amount of any financial support which other people have provided or are likely to,[23] including crowdfunding. *Lewis* demonstrates that, provided the claimant genuinely assesses the future crowdfunds to be raised, if more funds are raised than predicted (for instance following significant media coverage), this does not mean the claimant failed to provide sufficient information.[24] Responding to the claim form, the defendant public body either agrees or disputes that it is an Aarhus claim – in the latter scenario, a High Court judge adjudicates on the matter.[25] The defendant may seek to vary or remove the costs limits such that the recoverable costs if the claimant loses are higher than standard, again requiring adjudication.[26] It was not contested that the two case studies were Aarhus claims. Indeed, for

[21] Jerry Flynn for Up the Elephant, 'Save Elephant and Castle's diverse community!' (CrowdJustice, 2019) <https://www.crowdjustice.com/case/stop-the-elephant-shopping-centre-destruction/>; Jerry Flynn for Up the Elephant, 'We're fighting on – JR Appeal to Save the Elephant's Diverse Community' <https://www.crowdjustice.com/case/save-the-elephants-diverse-com-appeal/>.

[22] HM Courts and Tribunals Service, *N461 Judicial Review Claim Form*, section 7 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1056607/N461_0222_save.pdf>.

[23] CPR 45.42.

[24] *R (Lewis) v Welsh Ministers* [2022] EWHC 450 (Admin), Eyre J at [17].

[25] HM Courts and Tribunals Service, *N462 Judicial Review Acknowledgment of Service*, section 5 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1056609/N462_0222_save.pdf>.

[26] Reforms allowing defendants to apply to vary the cap at any stage of proceedings were largely tempered by judicial review litigation: *R (Royal Society for the Protection of Birds and others) v Secretary of State for Justice*

Up the Elephant, Southwark Council was regarded as being as "good as gold throughout on the costs issue" (Lawyer 1, Up the Elephant). Seeing the legitimacy to the point being tested by a set of responsible campaigners, they did not even pursue the £5,000 after the claimant's High Court loss, although they did recover the £10,000 after the unsuccessful appeal. Some lawyer interviewees did note that defendants are not always so flexible with costs, and not uncommonly seek to vary caps, for instance to raise a £5,000 cap to £10,000 – perhaps if crowdfunding has already proven successful. That said, there was a sense among lawyers that once the initial cap is set, whether by consent or adjudication at the permission stage, contestation over the rate later in the case is relatively rare. The CARA claim saw one such rare, and quite unusual, dispute arising after the claimants won in the High Court, wherein the interested party successfully applied to vary the costs order to exclude VAT, limiting their costs liability to the claimant to £35,000 rather than £42,000.[27] This type of later contestation was regarded as a rarity, though, and the Aarhus regime was largely thought to provide stability in assessing costs.

This stability is key for claimants, especially local community groups, seeking to mobilise law via crowdfunding – as Chapter Two demonstrates, and Up the Elephant reflects, these groups often fundraise sums close to the Aarhus limit. Without the Aarhus cap, there would almost certainly be significant attrition, if groups crowdfunded to cover open-ended risk of liability, both needing to raise greater amounts from a predominantly local base, and facing greater uncertainty over what sum will suffice – the classic dual problem of the 'loser pays' rules in this context.[28] Accordingly, in reducing some of this risk, which has 'chilled' environmental legal mobilisation,[29] the Aarhus regime appears to have hugely shaped the character of mobilisation in the local community environment and planning realm.[30] Crowdfunding bolsters this, enabling those of limited means to meet that Aarhus cap. This aptly

and another [2017] EWHC 2309 (Admin). See David Hart KC and Jonathan Metzer, 'The Aarhus Costs Rules – Past, Present and Future' (2018) 23(2) JR 83.

[27] *R (Croyde Area Residents Association) v North Devon District Council* [2021] EWHC 703 (Admin).

[28] Lisa Vanhala, 'Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK' (2012) 46 L.& Soc'y Rev 523, 539.

[29] Lisa Vanhala, 'Is Legal Mobilization for the Birds? Legal Opportunity Structures and Environmental Nongovernmental Organizations in the United Kingdom, France, Finland, and Italy' (2018) 51(3) Comp.Pol.Stud. 380.

[30] See also Julia Eriksen, Carol Day and William Rundle, *A pillar of justice* (RSPB and FoE 2019); Carol Day et al, *A Pillar of Justice II* (ELF, FoE and RSPB 2023).

demonstrates the danger of taking too static a view of legal opportunity structures, and the value of recognising the agency of groups and lawyers in engineering opportunities 'from below' to access law.[31] The Aarhus regime is a form of legal opportunity, a top-down, government-introduced cap that provides a stable and attainable target; crowdfunding represents a bottom-up means by which environmental groups accumulating resources to reach that target. In an imperfect patchwork of litigation funding, this collaboration between the state's opportunity structures and groups' agency to crowdfund resources has facilitated more effective legal mobilisation. Far from crowdfunding disrupting public interest litigation, what we see, in the judicial approach to crowdfunding in claims like *Lewis*, and in the accounts of case study participants, is this new resource supplementing, and being incorporated relatively comfortably and straightforwardly into, the existing Aarhus framework. Though somewhat less cut-and-dried, in non-environmental cases we again see the public interest litigation landscape reckoning with and integrating this resource, with routine practice emerging which ought to quieten, or at least contextualise, the dominant framings among policy and scholarly commentary.

Costs-capping orders

The non-environmental situation has parallels to the picture outlined above, but is far less straightforward. Here, groups seeking to limit their adverse costs liability must agree, or have a court grant, a costs-capping order (CCO), where requirements are more rigorous, and the sums less certain and stable, than for Aarhus claims. The government only needed to create new rules for environmental cases specifically to satisfy the Aarhus Convention, but that does not itself justify maintaining separate regimes where the non-environmental arrangements are distinctly less claimant-friendly. After all, the principled justifications for costs protection in environmental claims – ensuring prohibitive costs do not deter citizens from public interest cases, maintaining the rule of law – hold firm elsewhere in public interest litigation.[32]

The law and practice governing CCOs, known previously as 'protective costs orders' (PCOs), has developed considerably in a relatively short period. While there were some

[31] Ellen Ann Andersen, *Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation* (University of Michigan Press 2004), 214; Chris A Rootes, 'Political Opportunity Structures: promise, problems and prospects' (1999) 10 La Lettre de la maison Française d'Oxford 75.

[32] Tom Mullen, 'Protective Expenses Orders and Public Interest Litigation' (2015) 19(1) Edinburgh L Rev 36, 59-60.

applications for PCOs beforehand, with mixed judicial receptivity,[33] the now-classic case of *Corner House* gave the process life, with Lord Phillips MR outlining the governing principles for granting a PCO.[34] A court could grant a PCO on such conditions as it thought fit, provided it was satisfied with a number of criteria, including, inter alia, that making an order would be fair and just with regard to the applicant and respondent's financial resources and the likely costs; and, that without the order being made, the applicant would probably discontinue proceedings and would act reasonably in so doing. An applicant's representatives acting pro bono would enhance the PCO application. PCOs were later placed on a statutory footing in the Criminal Justice and Courts Act 2015,[35] and renamed as CCOs, after the coalition government became concerned at the flexibility with which this discretionary process had been applied, seeking to 'rebalance financial incentives' and encourage claimants to consider more carefully the merits of litigating.[36] Ultimately, codification changed relatively little from the *Corner House* principles, with judges retaining considerable discretion. That said, legitimate concerns exist around the new regime's narrower conception of 'public interest proceedings' (evidenced by, for instance, an emphasis on the number of people affected) and the reduced flexibility of codification.[37] The cap can only be introduced once the claimant has been granted permission, producing a potential chill on applying for permission,[38] and the defendant's costs must also be capped (albeit not necessarily mirrored),[39] significantly limiting claimants' potential costs recovery if successful. The costs-capping regime is utterly integral in crowdfunded public interest litigation. Participants agreed many crowdfunded cases, including many case studies, could not proceed without costs-capping. One campaigner for 999 Call for the NHS (999 Call) remarked:

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[33] For instance *R v Lord Chancellor Ex p Child Poverty Action Group and R v DPP Ex p Bull* [1998] EWHC Admin 151; [1999] 1 WLR 347. For discussion see Shami Chakrabarti, Julia Stephens and Caoilfhionn Gallagher, 'Whose cost the public interest?' [2003] PL 697, 702-705.

[34] *R (Corner House Research) v Secretary of State for Trade & Industry* [2005] EWCA Civ 192, [2005] 1 WLR 2600, Lord Phillips of Worth Matravers MR at [74].

[35] ss 88-90.

[36] Ministry of Justice, *Judicial Review: Proposals for Further Reform* (Cm 8703, 2013).

[37] Chris McCorkindale and Paul Scott, 'Public Interest Judicial Review in Cross-Border Perspective' (2015) 26(3) K.L.J. 412, 429.

[38] s 88(3). Alex Mills, 'Reforms to judicial review in the Criminal Justice and Courts Act 2015: promoting efficiency or weakening the rule of law?' [2015] PL 583, 590.

[39] s 89(2).

> you really need to get your costs capped ... so [the named claimant] didn't lose [their] house … We're grassroots activists … we were crowdfunding for everything that we have, and we can't bring this case if we have unlimited exposure to costs (Campaigner 4, 999 Call).

Multiple lawyers, with experience representing different litigation parties, remarked that it is highly unusual for crowdfunding to raise sufficient funds for a claimant to satisfy an adverse costs order and pay their own lawyers, without costs-capping, which was said to go "hand-in-hand" with crowdfunding (Lawyer 1, ICO). For many non-environmental campaigners, then, crowdfunding seemingly only wedges open access to judicial review if costs are also capped; even with crowdfunding, there may be considerable withdrawal of claims at the permission stage if a CCO is refused, for instance, the campaign group We Love Hackney which withdrew following refusal of a CCO,[40] having crowdfunded £20,807.[41]

The approach to crowdfunding in the grant and terms of a CCO highlights the hitherto underappreciated routinisation of crowdfunding in the CCO process. Given the unpredictability of crowdfunding success and the judicial discretion as to granting CCOs, this routinisation over a relatively short time period is perhaps surprising. Numerous participants suggested the default position where a crowdfunded claimant seeks a CCO appears to be that the level of the cap closely reflects the amount crowdfunded. Put another way, roughly whatever the claimant fundraises will contribute to the cap. Using crowdfunding, a claimant maximises their offer of a cap to be most palatable to a defendant and, if necessary, the court. Participants felt that, where a claimant lacks much free resource with which to litigate – often the case when crowdfunding – the court usually accepts that the only money available is the crowdfunds, and will set the CCO's limit at roughly the level crowdfunded. In the right to rent claim, the JCWI had very limited funds and used crowdfunding to offer the court a level for the cap – it was set at £5,000 at the High Court and £7,500 in the Court of Appeal, closely resembling what had been raised by then.

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[40] *R (We Love Hackney Ltd) v London Borough of Hackney* [2019] EWHC 1007 (Admin). Ed Sheridan, 'We Love Hackney's judicial review against council's nightlife licensing rules in Dalston and Shoreditch is pulled after costs ruling' *Hackney Gazette* (London, 10 June 2019) <https://www.hackneygazette.co.uk/news/22933670.love-hackneys-judicial-review-councils-nightlife-licensing-rules-dalston-shoreditch-pulled-costs-ruling/>.

[41] We Love Hackney, 'We Love Hackney – defend Hackney nightlife' (CrowdJustice, 2019) <https://www.crowdjustice.com/case/welovehackney/>.

When fundraising after a CCO has been granted, the claimant has a degree of certainty as to the amount they should fundraise, as with the Aarhus cap. Campaigners can then clearly target how much is needed to proceed, and know with greater clarity the labour they need to invest in fundraising. For some claimants, lawyers expressed, having a set limit on costs can be just as, if not more, important as having a low costs limit – even if a CCO would not provide downward pressure on costs, it would crucially avoid open-ended costs risk. Having a finite amount ought also to make crowdfunding easier to market. That said, the CCO regime is comparatively less certain than the Aarhus regime. The caps do not have a default set value – say, £5,000 or £10,000 and £35,000, as with Aarhus – and are, in this context, set according to the level of crowdfunding. Claimants must thus ensure the reciprocal cap is not too restrictive, or their costs recovery (where successful) might not cover fees of counsel and firms' overheads. Furthermore, where claimants begin fundraising before the CCO is granted, as is often the case – to cover costs up to permission for instance – they will not at that stage know the cap's level. Here, it was noted, claimants can easily become a victim of their own success: if they fundraise successfully before permission, this may strengthen the defence's case for setting a higher cap. CrowdJustice's structure of initial and stretch targets is valuable here: campaigners can raise funding in stages as it becomes necessary. The challenge associated with fundraising prior to a CCO being granted is discussed below.

A clear indication of crowdfunding's routinisation in the CCO process is the notion that, where claimants seek to have adverse costs capped at a low rate, but lack substantial internal funding, judges will expect them to have attempted to crowdfund. Participants across case studies reported this as an increasing judicial expectation.

> [Y]ou do need to show that you've tried crowdfunding if it's remotely an option, or explain why you haven't tried it, and if you have tried it, what your target is and why your target isn't going to be enough [without a CCO] (Lawyer 1, JCWI).

It appears well-understood that if a claimant can raise a reasonable sum of money in a public interest case granted permission, a judge is likely open to granting a CCO. Equally though, many felt that defence solicitors, particularly in the Government Legal Department (GLD), now expect public interest claimants who are not themselves capable of covering upwards of, say, £20,000 in adverse costs should crowdfund – with defendants contesting the grant of CCOs where crowdfunding has not been conducted, some indicated courts have begun to ask similar questions of claimants. Indeed, it was suggested that a local or national campaign group are unlikely to have much excuse before a judge for not attempting crowdfunding, absent a

compelling reason. As such, where potentially viable, crowdfunding is usually worth attempting, at least to demonstrate the claimant has explored all funding options prior to applying for a CCO, and to anticipate the defendant suggesting a higher cap could be reached if crowdfunding were tried. In these circumstances, a judge will likely view the sum offered by a claimant more favourably than where they seek a CCO without much internal resource and without attempting to crowdfund. For instance, in *Beety*,[42] a key early case on crowdfunding and costs-capping, a group of private midwives conducted a relatively limited crowdfunding exercise, and Ouseley J granted a CCO but asked for them to crowdfund a small amount more.

One might instinctively respond that this confirms concerns that the growing emphasis on crowdfunding in public interest litigation prejudices less popular claims.[43] Participants indicated, though, that in practice judges are live to the fact that crowdfunding is not appropriate for all cases, even all 'public interest' claims. It appears Administrative Court judges are open to claimants, when applying for the court to grant a CCO, explaining in witness statements that a claim is ill-suited to gaining traction using crowdfunding, for instance because the issues tend not to be popular. This might somewhat temper concerns around populist justice, at least in the costs-capping context, though not the wider issue of access to justice being contingent on arbitrary market factors. It also highlights the integral role of the witness statement to navigating the CCO process and achieving favourable terms, by setting out the practical realities of fundraising, explored subsequently. Returning to the chapter's core argument, though, how are we to square these observations from practice – that defendants and judges are encouraging and expecting claimants to use crowdfunding – with commentators' predictions that crowdfunding is likely to disrupt the judicial review system and draw judges into politics in a way that they and the government dislike? The answer, perhaps, is that our core accounts of crowdfunding to date have paid insufficient attention to its practical use in the weeds of pre-action procedure. Amongst this relative silence, Tomlinson rightly predicted costs-capping would be a 'common feature of crowdfunding judicial review litigation in the coming years',[44] although, understandably in the absence of empirical study, even this centred

[42] *R (Beety) v Nursing and Midwifery Council* [2017] EWHC 3579 (Admin).

[43] A concern raised about crowdfunding previously, though not in relation to CCOs. See Tomlinson (n 2), 179; Sam Guy, 'Access to justice on the market: An empirical case study on the dynamics of crowdfunding judicial reviews' [2021] PL 678, 685.

[44] Tomlinson (n 2), 176-177.

largely on one high-profile (though important) case which crowdfunded nearly £265,000.[45] The experiences of participants in the present qualitative research indicate crowdfunding's practical role in public interest litigation may differ markedly from the accounts centred on politically high-profile, sometimes meritless litigation, revealing an altogether more routine picture, and, in the CCO context, one which defendants and judges appear to accept.

A key challenge in the relationship between CCOs and crowdfunding concerns the fact the costs-cap is decided at the permission stage.[46] This represents a possible difficulty incorporating crowdfunding into judicial review – a potential disruption, perhaps – but also the adaptability of the process and the development of routine practice to respond to this. The challenge comprises two dimensions. First, and less significantly, a claimant will want to be confident that they can cover their opponents' costs accrued before permission. They will thus likely be recommended to begin crowdfunding prior to permission, to shield against the potential costs if unsuccessful at permission and the defendant (or an interested party) seeks to recover costs. Generally, defendants can recover the cost of filing their acknowledgment of service, but not the cost of an oral renewal hearing for permission (with courts retaining discretion to award otherwise exceptionally).[47] As such, claimants are "relatively well insulated at the permission stage costs" (Lawyer 1, CARA), only needing to crowdfund to potentially cover the defendant's costs of filing the acknowledgment of service (as well as any claimant-side legal costs). This may have been complicated in some cases with multiple defendants or interested parties. The courts have, for the acknowledgment of service, departed from the general principle in public law litigation that only one set of costs are awarded against the claimant,[48] allowing a costs award against the claimant for multiple respondents' acknowledgments of service where permission is refused. This has almost certainly created financial uncertainty for claimants,[49] and would require greater fundraising than otherwise necessary.

[45] *R (Hawking and ors) v Secretary of State for Health and Social Care and anor* [2018] EWHC 989 (Admin).

[46] Criminal Justice and Courts Act 2015, s 88(3).

[47] *R (Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346, [2004] CP Rep 12 at [76].

[48] *CPRE Kent v Secretary of State for Communities and Local Government* [2021] UKSC 36. For an argument against this policy, see Alistair Mills, 'Costs, Permission and Interested Parties' (2014) 19(3) JR 173. The general principle is contained in *Bolton Metropolitan District Council and ors v Secretary of State for the Environment and ors* [1995] UKHL 27, [1995] 1 WLR 1176.

[49] A policy argument advanced by the claimant in *CPRE Kent*.

The second issue is more substantial. Claimants will often have commenced crowdfunding prior to permission, but not fully completed it – indeed, the bulk of fundraising may occur after the CCO has been set. As such, when seeking a CCO at a certain rate, claimants may have to predict what they will fundraise in future, which is far from straightforward, as the discussion in *Lewis* indicates. One claimant lawyer said:

> it's not an exact science … you have to predict at the point of filing the claim what you think your client is going to be able to afford which [is] … often tricky because you don't know which cases are going to be successful in terms of fundraising … you have to do all this predictive exercise at the start … then the court procedure isn't really flexible … so you're often left in a situation where you caveat your application for a costs-cap, on the basis of 'this is all depending on how well the crowdfunding goes', and if it goes badly, then you may apply for the costs-caps to be varied. If it goes very well, then the other side might do the opposite (Lawyer 2, JCWI and 999 Call).

This lawyer also noted that, in the right to rent and 999 Call claims, both relatively early cases of crowdfunded claimants seeking CCOs:

> we were using the cost caps in environmental cases as a bit of a benchmark to read over what we considered would be an appropriate kind of cap for the court to award. So we were using similar reciprocal amounts

Accordingly, though a charity rather than an individual, JCWI's cap in the High Court was £5,000, while 999 Call's cap was slightly above £10,000. Some participants, though, expressed that courts may now often expect claimants to raise higher rates than in the early cases. Again, witness statements are central here in outlining a claimant's situation, and in reaching an appropriate cap that avoids chilling action through unduly burdensome terms. Participants reported that, where a claimant and defendant cannot negotiate a CCO and require the court to adjudicate, the group member responsible for the claimant's crowdfunding generally submits a witness statement, outlining how much they have funded to date in what time period, the factors that have influenced that fundraising level, and a justified projection of likely future fundraising. Solicitors often assist the group in preparing this. Participants suggested a group's first fundraising effort is often the most productive; seeking repeat donations can result in donor fatigue and diminishing returns, barring the claim gaining renewed public salience. Claimants may thus explain to the court that they might realistically only be able to raise a certain additional amount in future, and ask for the cap to reflect that. This request may be strengthened

where a group with professional fundraising activities makes the claim based on prior experience. Courts appear receptive to explanations that external factors, such as the cost-of-living crisis or the Covid pandemic, might affect claimants' capacity to crowdfund, meaning the CCO ought not to set overly demanding targets. In the Immigration Exemption claim, campaigners initially wondered whether the presence of crowdfunding would inflate the judge's order, on the basis they would be appealing to the public. the3million and Open Rights Group had sought a CCO at a lower rate but, after the government contested the value, the Administrative Court set it at £40,000. The campaigners felt, in practice, crowdfunding did not inflate judicial expectations, and the level reached was regarded as reasonable, with the court seemingly understanding that crowdfunding success is not guaranteed.

Administrative Court judges, then, appear comfortable with claimants explaining they intend to meet a costs-cap with funds they do not have upon applying for a CCO, but will raise later. In the Immigration Exemption case, neither organisation had £40,000 in reserves, but the court appeared comfortable with their proposal to fundraise after the cap was granted, through crowdfunding activity occurring around the case. Perhaps it is unsurprising that judges seem receptive to explanations in witness statements outlining the practicalities of crowdfunding, and why it may only raise a certain amount more after permission. After all, in several years determining PCOs and CCOs, courts have needed to engage with claimant groups' finances. For instance, where NGOs receive philanthropic grants or charitable funds for specific purposes excluding litigation, courts will be used to being informed why that money should not be accounted for in setting a CCO. In this way, crowdfunding again – far from causing judicial disruption and confusion – slots reasonably neatly into the public interest litigation landscape. A practice of explaining and predicting crowdfunding prospects in a witness statement resonates with standard practice outside of crowdfunding; crowdfunded claimants are still expected, as usual, to disclose information on the funds in their bank accounts, and their overheads and operating costs, and justify why those assets – for individuals, this may include houses or other personal financial assets – should not go towards the CCO. Crowdfunding ought to shelter claimants from personal assets going towards a CCO. While perhaps relatively unsurprising then, it is certainly reassuring that courts appear to be taking a pragmatic approach towards incorporating crowdfunding into public interest litigation, avoiding regularly placing unduly burdensome requirements on claimants.

As noted, given fundraising may perform better or worse than expected, predicting crowdfunding success in order to set the CCO level is "not an exact science". To reflect this,

the costs-cap is not uncommonly varied at a later point. Variation is not a new phenomenon, utilised under the PCO regime, and is a useful residual tool giving parties – where crowdfunding is concerned, usually defendants – assurance around costs recovery. The possibility that the CCO limit will be varied upwards also allows claimants to be realistic and cautious when crafting their witness statements – they can seek a fairly modest level of CCO, while caveating that if crowdfunding performs better than anticipated, the amount can be varied upwards. This is certainly preferable to claimants offering a higher and riskier cap in the first instance and being unable to meet it – it is unclear how a court would respond to this. Often, "sensible claimants will offer terms on which the levels of the order can be revisited, if the crowdfunding generates more money" (Lawyer 1, ICO). This arrangement works reasonably well, though there is a perversity for campaigners: if they continue crowdfunding beyond the initial level of the cap, the defendant will plausibly seek, and the court will grant, an increased cap. As such, funds donated once the cap is met might simply bolster the defendant's costs recovery, where the claimant loses the case. Claimants here may perhaps again become "victims of their own [fundraising] success". The prospect of upward variation draws attention to a key facet of the routinisation of crowdfunding in the CCO process: defendants, it appears, have come to recognise crowdfunding "as a fact of public law life these days" (Lawyer 1, ICO). What is more, they can sometimes benefit from its presence: crowdfunding facilitates costs recovery at a higher rate from CCOs compared to non-crowdfunded CCOs. Offering a CCO at a higher level, facilitated by crowdfunds, thus makes a CCO "a much more attractive deal" to agree, for both defendants and judges (Campaigner 1, the3million/ORG). For defendants, crowdfunding means they will likely recover some costs from CCO cases: if small NGOs brought litigation without crowdfunding, they would have very limited finances and a CCO would thus be set at levels similar to Aarhus claims (effectively nominal). In practice, defendants, particularly in central government, will often not dispute the CCO being set according to the rate of crowdfunding, in cases of public importance brought by small organisations.

In particularly successful crowdfunding campaigns among the 'outlier' cases discussed in Chapter Two, central government's costs recovery from a crowdfunded CCO may even match or exceed the costs of litigation to the public purse. The government estimates costs based on the inter-partes rate, generally considerably higher than the internal rates charged by the GLD. The courts allow recovery at higher rates than the GLD rates, which are, somewhat notoriously, far lower than commercial rates. A crowdfunded CCO, though well below the

inter-partes rate, may therefore be far closer to the GLD rates actually incurred. Defendants seemingly accept crowdfunding as a feature of the modern landscape of public interest judicial review, in some cases encouraging its use to optimise costs recovery – this indicates the degree crowdfunding has become part of the furniture. Such an observation of the system is far removed from the common concerns of commentators such as Horne,[50] which are of an entirely different nature and – though worthy of attention – appear somewhat disconnected from how crowdfunding materially contributes to the practice of judicial review costs.

To conclude this discussion of costs protection, it should be apparent that, for public interest claimants lacking resource, the interface of crowdfunding and costs-capping represents the key to mobilising judicial review. Without costs-capping, crowdfunding's utility appears vastly reduced. It is reassuring, then, that the dynamic appears increasingly well-understood and routinised across parties, with the judiciary open to the function of crowdfunding in aiding costs-capping. Of course, some concerns remain – for instance, that claimants who raise less might see greater pushback in their CCO application, while the implications of expecting claimants to crowdfund are potentially problematic. Yet it appears claimants have leeway to justify their position, particularly in witness statements, perhaps alleviating some of these problems. This should, then, represent something of a relief for those, like Tomlinson, concerned that, in opening the field of litigants, crowdfunding will cause a dilution of the 'craft' of public interest litigation. In the costs-capping context at least, it seems that far from a dilution, we are seeing the incremental development of standard practice and the (reasonably) smooth incorporation of crowdfunding into the existing landscape. This relationship will continue to be central in future, absent improved state provision of funding, discussed next.

Crowdfunding in the legal aid crater

Legal aid cutbacks are widely regarded, as Chapter One indicated, to represent a key driver of litigants' turn to crowdfunding.[51] Crowdfunding thus facilitates access to judicial review in the crater left by LASPO 2012; yet in doing so, it may strengthen the narrative argument of political elites to resist calls to restore legal aid funding.

[50] Horne (n 1).

[51] See for instance McCorkindale and McHarg (n 3), 287-288.

Crowdfunding might be said to represent a backup option where (increasingly commonly) no relevant individuals can receive legal aid funding. Legal aid provides adverse costs protection and payment of claimant lawyers (albeit at low rates). For Up the Elephant, a claimant thought to be eligible for legal aid was initially identified in pre-action correspondence, however it became clear that eligibility – or, at the very least, finding out in a timely fashion whether legal aid would be granted – would prove problematic, prompting the shift to crowdfunding. As one campaigner noted:

> [t]o start off … the claimant was somebody who was entitled to legal aid. Legal aid has been cut back drastically over the last few years … it's harder and harder to qualify to get it. Practically, you've got to be destitute to get it … the further we went into that, the more difficult it looked it was going to be (Campaigner 1, Up the Elephant).

This is emblematic of what was regarded, by multiple lawyers across case studies, as a growing trend in legal aid. There was consensus that crowdfunding has grown in response to legal aid cutbacks, particularly since LASPO, and that a more extensive legal aid regime would be a preferable form of costs protection than crowdfunding. One lawyer in the right to rent case noted that, had the JCWI brought such a case "pre-LASPO, [they] would've just found a claimant and got them legal aid and run it that way" (Lawyer 1, NRLA). When bringing a case via a legally-aided claimant, winning the case benefits the individual but also the wider class of which they belong. It has long been acknowledged as a means to bring strategic litigation,[52] enabling campaign groups to navigate a system of costs protection which is fundamentally individualist in application and discourages group actions.[53] However, with cuts following LASPO, and the strict application of the personal interest test for legal aid funding in cases with a public interest, the drive to crowdfunding was perhaps inevitable; indeed, as McCorkindale and McHarg note, the model is more naturally suited to group litigation.[54]

Where a legally aided claimant would once have been found, then, cases increasingly must crowdfund. The picture is not entirely straightforward though. Several participants suggested the existence of crowdfunding might provide further narrative incentive for both the government to legitimise a systemic reduction in legal aid, and for the Legal Aid Agency to refuse legal aid in individual cases to (local) communities bringing cases with a public interest.

[52] Kinghan (n 14), 12.

[53] Harlow and Rawlings (n 13), 115-116.

[54] McCorkindale and McHarg (n 3), 287-288.

This chimes with a longstanding quandary among progressive lawyers that tools like pro bono representation, alleviating some of the gaps from state funding cuts, strengthens the political argument to reduce legal aid.[55] The Legal Aid Agency, participants felt, will seek any reason to refuse legal aid – as *Gudanaviciene* demonstrated,[56] even the perceived potential availability of free legal help has been used to justify refusing legal aid.[57] Several participants reported that the Agency has begun using the potential of crowdfunding as a reason to refuse legal aid, effectively telling local communities they should crowdfund their public interest claims. The Agency had, prior to the rise of online crowdfunding, already begun requiring that affected communities, in some public interest cases, contribute to their legal aid certificate through community contributions, wherein the relevant community fundraises to cover a portion of the legal aid certificate. Participants regarded this as a far more reasonable ask of communities than refusing legal aid altogether based on the abstract potential of crowdfunding. Crucially, while crowdfunding has delivered some very lucrative fundraising in 'outlying' national-level cases, it should come as little surprise that participants felt the causes and groups tending to seek legal aid – poor working-class and marginalised communities – are not likely to generate the same sympathy as high-profile cases around, for instance, Brexit. Crowdfunding thus might appear an unconvincing reason to refuse such communities legal aid.

Some participants linked the Agency's reluctance to fund public interest cases to its increasingly close association with the Ministry of Justice. This aligns with concerns raised elsewhere about LASPO's reforms transferring decision-making power over individual legal aid applications from the Legal Services Commission – with considerable operational independence – to the Agency – which is closely integrated within the Ministry of Justice. The relationship of central government to the administration of legal aid thus appears closer and more blurred, increasing the potential for more direct control over the scheme.[58]

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[55] Andrew Boon and Robert Abbey, 'Moral Agendas? *Pro Bono Publico* in Large Law Firms in the United Kingdom' (1997) 60(5) MLR 630, 654; Richard Abel, 'The Paradoxes of Pro Bono' (2010) 78 Fordham L Rev 2443, 2444.

[56] *R (Gudanaviciene and others) v Director of Legal Aid Casework and another* [2014] EWCA Civ 1622 at [166].

[57] Paul Yates, 'CourtNav and Pro Bono in an Age of Austerity' in Ellie Palmer et al (eds), *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart Publishing 2016), 251.

[58] Andrew Le Sueur, 'The Foundations of Justice' in Sir Jeffrey Jowell and Colm O'Cinneide, *The Changing Constitution* (9th edn, OUP 2019), 226, 228. This echoes a conclusion of the Bach Commission's report: Bach Commission, *The Right to Justice: The final report of the Bach Commission* (Fabian Society, 2017), 35. See also

Crowdfunding emerges, then, as a Janus-faced form of resource mobilisation. It is clearly capable, sometimes, of ameliorating the difficulties communities face in accessing judicial review. Indeed, for Up the Elephant, a working-class community lacking ready access to legal aid could bring a public interest challenge on this basis. Yet crowdfunding may also exacerbate these difficulties, providing narrative cover for increasingly stringent policy and application towards funding cases with a communal dimension. This, it was felt, will squeeze out working-class communities – who also appear less likely to receive substantial crowdfunds – from litigation. To be categorically clear, crowdfunding simply cannot be shown to adequately fill the resource gap from legal aid cuts.[59] Any such governmental framing should be resisted in the strongest terms. In these ways, crowdfunding's expansion resonates strongly with pro bono provision. A mechanism useful in eroding 'the gap', to enable valuable legal mobilisation in individual cases, may also present convenient narrative fodder for the state in papering over system-level cracks. The continued exclusion of vast swathes of the citizenry from legal aid is, to be frank, a far more pressing and systematic issue than the problematic use of crowdfunding in a small number of controversial, high-profile cases. It is time discussion of crowdfunding pays appropriate attention to the relative power imbalance facing claimants in the hostile costs and funding landscape which drives crowdfunding's use.

Claimant lawyers as facilitators

If crowdfunding's key purpose is covering adverse costs, we might note that this leaves unresolved the question of whether and how claimants' own lawyers are paid. There are a variety of approaches here, with many lawyers in these case studies acting on reduced rates to enable cases to proceed.

In some case studies, lawyers were instructed pro bono, or on a pure Conditional Fee Agreement (CFA), that is, 'no-win no-fee' – not paid unless the claimant succeeds. It was widely acknowledged that, in public interest cases, lawyers are often willing to act unpaid because of the case's value: as one lawyer noted, in "more important cases, it tends to be I'm often doing it pro bono" (Lawyer 1, JCWI). Whereas CFAs in civil litigation generally involve a successful client paying their lawyers a success fee from their compensation, on top of the

discussion of exclusion from judicial review due to Legal Aid Agency practices in Joe Tomlinson, 'Foundations for a 'secret history' of judicial review: a study of exclusion as bureaucratic routine' (2019) 41(2) JSWFL 252.

[59] Tomlinson (n 2), 181.

costs lawyers recover from the other side,[60] the general absence of monetary remedies in judicial review means a success fee is likely not appropriate. 'CFA-lites' are therefore often agreed, as in some of the case studies. Here, there is no success fee, meaning a successful claimant's lawyers only recover costs from the other side by an inter-partes costs order.[61] This facilitates access for claimants, but does mean lawyers are uncompensated for the risk of acting unpaid.[62]

Another, similar option used in cases, including the 999 Call litigation, is a Discounted Fee Agreement (DFA). As a lawyer for 999 Call explained, claimants agree to pay their solicitors and barristers a low fixed rate of "fees at the outset", which is "nowhere near what you would be paid commercially" (Lawyer 1, 999 Call). If the claimant loses, the lawyers are paid that low amount; if they win, the lawyers recover costs from the other side alongside that fixed rate.[63] This participant noted lawyers tend to be very flexible on fees when representing campaign groups. In such cases, the crowdfunding target might be set according to the low fixed rate in the DFA, alongside the costs-cap value. As a 999 Call campaigner put it, these agreements rely on lawyers acting with an "altruistic motive" and being "genuinely motivated by trying to seek justice and helping us to do this at the lowest price tag possible" (Campaigner 4, 999 Call). As such, claimant lawyers represent key facilitators of crowdfunded legal mobilisation. It is widely acknowledged, and perhaps self-evident, that legal expertise –[64] or legal 'intellectual resource' –[65] and knowledge of legal opportunities are central resources for mobilisation, forming part of Epp's 'legal support structure'.[66] Lawyers assist campaigners to transform the abstract potential of law into a claim, and navigate the litigation process. Yet to do so, they must of course be affordable. As crowdfunding largely exists to cover adverse costs, campaigners will often need flexibility from their own representatives as regards fees.

[60] Richard Moorhead, 'CFAs: A Weightless Reform of Legal Aid?' (2002) 53 NILQ 153, 153, 156.

[61] Ravi Low-Beer and Joe Tomlinson, *Financial Barriers to Accessing Judicial Review: An Initial Assessment* (Public Law Project 2018), 19.

[62] ibid.

[63] ibid 19.

[64] Carolyn Abbot and Maria Lee, *Environmental Groups and Legal Expertise: Shaping the Brexit process* (UCL Press 2021).

[65] Virginia Passalacqua, 'Legal mobilization via preliminary reference: Insights from the case of migrant rights' (2021) 58(3) CMLR 751, 768.

[66] Epp (n 10).

It is hardly new that claimant lawyers regularly act on reduced rates, or unpaid, in public interest and community litigation. Dating back to *Corner House*, PCO applications have always been strengthened where claimants' lawyers act pro bono. When deciding whether to grant a CCO, the Criminal Justice and Courts Act 2015 requires courts have regard to whether a claimant's representatives are acting free of charge,[67] and while they need not be engaged pro bono, lawyers have at least tended to act under a CFA-lite or DFA in such cases. One campaigner in the right to rent case suggested that lawyers going unpaid if unsuccessful "isn't necessarily a bad thing. I think that you have to have a filter to prevent everyone just pursuing a JR all the time about everything" (Campaigner 1, NRLA). While not new, then, this picture does dispel the tempting idea that crowdfunding tends to earn lawyers lots of money. Not only must lawyers often be flexible on fees in crowdfunded cases, certain tensions can hinder costs recovery even when successful. First, costs recovery upon winning is limited to the reciprocal cap in CCO and Aarhus claims. This was said to put a strain on claimant lawyers, who do not recover costs to the same degree as they could without costs-capping, but proceed with costs-capping in their clients' best interests. The lack of success fee in a CFA-lite claim exacerbates this. Furthermore, one lawyer noted the relationship of crowdfunding and costs-capping can present another potential financial difficulty. If a campaign group has its costs capped at a certain level, say, £10,000, meeting the value of the costs-cap can become "a target" to fundraise towards, which can be "a good motivator" for donors, but may equally become "a ceiling". Once that target has been raised, particularly among communities of limited means, "where's the incentive on that community to keep fundraising" to fund claimant lawyers' fees? (Lawyer 2, Up the Elephant). Though many lawyers willingly adopt this risk, it hardly represents a sustainable longer-term business model, at least without supplementary funding streams.

Far from crowdfunding representing an easy profit mechanism for lawyers, then, they are sometimes required to be flexible and sacrificial towards their fees in the public interest. Of course, some lawyers insist on being paid (close to) commercial rates and this will be factored into crowdfunding appeals, yet this was certainly far from standard practice in the case studies. The extent this reflects the wider field cannot be known at present, but lawyers' accounts make clear that acting on reduced fees is at least a common practice in crowdfunded cases. The observations in this section align with a recurring theme throughout the chapter:

[67] s 89(1)(d).

using crowdfunding to litigate is far less favourable to claimants than might be expected in the popular imagination. Again, there is evidence of the resource being incorporated routinely into the existing furniture of public interest litigation – bolstering fee agreements as well as costs-caps – but in no way does it undo reliance, it seems for many, on discounted or conditional fees. We are a long way from a "race to the millions" (Campaigner 1, the3million/ORG). Discussion of crowdfunding must have in mind this picture of cases of modest means, not just the outlying cases raising the bulk of the money in the ecosystem.

A different tale of leftover funds

Up to this point, crowdfunding's monetary resource role has been considered purely in relation to bringing the immediate piece of litigation – that is its primary purpose, after all. However, the funds raised can, in certain circumstances, also contribute to facilitating action moving beyond the claim, in a group's area of interest. Crowdfunding might, at first glance, appear an unlikely candidate for sustaining mobilisation beyond the individual claim for which it is employed. In many – likely most – cases this is not far from the truth. It is an inherently one-shot form of resource, and even among groups with ongoing campaign goals, many will only intend to litigate once, reacting to a particular unpalatable and justiciable executive decision in their sectoral or spatial area of interest. In many ways, that is its appeal – eroding the resource divide for groups who, because they do not litigate regularly, do not have resource (including experience and know-how) to litigate. Yet if we analyse one facet of crowdfunding frequently raised as a concern around transparency, we can deduce one key contribution crowdfunding *can* offer longer-term: if a crowdfunded claimant wins, and the other side pays their costs, what happens to the remaining funds?

In the vast majority of cases, this quandary of leftover funds is not remotely close to arising, given claimants' financial precarity. Either claimants lose, and will use what funds they have raised to cover other parties' costs, or they win and pay their own lawyers, likely engaged on a conditional fee basis. Usually, given the relatively modest sums raised, no unused funds will remain after those payments. Where funds do remain, CrowdJustice's general policy is that case owners donate those funds to the Access to Justice Foundation, or to a new case advancing a cause the case owner reasonably believes is similar to the original case, and they reasonably expect the average donor would supported.[68] The position, though, is radically different where

[68] 'Terms of Use' (CrowdJustice) <https://www.crowdjustice.com/terms-and-conditions/>.

the case owner is a registered charity or non-profit organisation. Here, once the case concludes, the owner retains any unused funds for 'its own general purposes'.[69] While very much the exception, then, claimants in some cases can retain their funds for wider work. Crowdfunding can thus present opportunities for further, more formalised action and mobilisation. This is arguably a feature of crowdfunding's resource-building capacity – a sufficiently long timeline to litigate is a useful resource,[70] and if claimants can retain crowdfunds, this in effect provides capacity to consider future litigation and related activities when necessary.

The Immigration Exemption case neatly reflects this. As Chapter Three outlined, after the claimants succeeded in the Court of Appeal, a later hearing resolved the form of relief to be granted: a declaration of incompatibility, suspended until 31 January 2022 allowing the Home Office to correct the defects.[71] To remedy this, the department introduced amending regulations,[72] and statutory guidance,[73] yet the campaigners regarded this as unsatisfactory given it was 'non-binding'.[74] While the claim had considerable impact notwithstanding this,[75] the groups later successfully challenged the Home Office's revised immigration exemption, with Saini J making declaratory orders as to the Exemption's unlawfulness, suspended for a short period for the government to put in place compliant legislation.[76] Having won in the Court of Appeal and retained funds from the crowdfunding, the groups were "able to reuse that funding for the purposes of collateral for the claim" challenging the revised exemption (Campaigner 1, the3million/ORG). The crowdfunding thus provided funds facilitating repeat

[69] ibid.

[70] Andersen (n 31), 5. For the classic discussion of repeat litigation, of course see Marc Galanter, 'Why the Haves Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9 L.& Soc'y Rev 95.

[71] *R (Open Rights Group and anor) v Secretary of State for the Home Department and anor* [2021] EWCA Civ 1573; [2022] QB 166.

[72] Data Protection Act 2018 (Amendment of Schedule 2 Exemptions) Regulations 2022/76.

[73] *Immigration Exemption Policy Document: Use of the immigration exemption under Article 23 of the UK GDPR and Schedule 2 of the DPA* 2018 (Home Office, January 2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1052791/IEPD_v.1.pdf>.

[74] 'Second Legal Challenge to Immigration Exemption in Data Protection Act 2018' (the3million, 21 June 2022) <https://the3million.org.uk/immigration-exemption-legal-challenge-2>.

[75] David Erdos, 'The UK GDPR, the Immigration Exception and Brexit: Interrogating *Open Rights Group v Secretary of State for the Home Department* and its Aftermath' (2023) 86(3) MLR 785.

[76] *R (the3million and anor) v Secretary of State for the Home Department and anor* [2023] EWHC 713 (Admin); [2023] WLR(D) 158, Saini J at [76].

litigation responding to follow-up issues, optimising the impact of the initial action and ensuring executive remedial accountability in practice.

CARA is perhaps the paradigm case of the transformative potential of unused crowdfunds where repurposed wisely and effectively. As a registered charity, crowdfunds were initially distributed into CARA's own account rather than paid into the solicitor's client account, and CARA was ultimately able to keep its remaining funds having succeeded in court. So far, so conventional (for a charity). There was, however, an unusual development in the claim. Upon withdrawing its appeal of High Court's decision, and looking to build bridges with the local community, Parkdean, the developer and interested party, made a proposal to CARA via an open letter from the General Manager of Ruda Holiday Park: Parkdean would pay CARA's costs up to the Aarhus limit of £35,000, but if CARA donated this money to local community projects, Parkdean would match that amount with another £35,000 donation, bringing their total contribution to £70,000.[77] (CARA's own lawyers were paid out of CARA's crowdfunds, so did not go unpaid even though Parkdean's adverse costs were donated). CARA accepted the proposal and has subsequently established the Area of Outstanding Natural Beauty (AONB) fund.[78] The costs paid to CARA thus go towards its charitable objects of preserving the AONB – CARA members noted that in any event they would have applied the remaining funds towards projects enhancing the AONB and people's enjoyment of it, notwithstanding Parkdean's proposal. To this end, CARA has designed a grant application form, process, and criteria, and set up a grant subcommittee. Some grants have been awarded thus far, although CARA is wisely showing caution to fund appropriate proposals, rather than spending the money as soon as possible. One grant which CARA has funded, alongside Ruda and the Parish Council, is refurbishing the village green in the centre of Croyde, which used to resemble a "dust bowl" and a "mud pit" at different times of year. Following successful improvements, Croyde now has "a village green instead of a village brown" (Member 1, CARA), creating a very good environment in the village's centre. This is an encouraging and exemplary case of a crowdfunding effort which has seen a just decision in the litigation itself, improved relations between the litigation parties, and litigation costs contributing to preserving the AONB and

[77] Letter from David Liebenberg to CARA Members (16 November 2021) <https://mcusercontent.com/3b8b169d1f1acbd7fbdeeca39/files/70b0f5e3-a4a5-0beb-c38b-a7aaffbaabb5/Open_Letter_to_CARA_Members.pdf>.

[78] 'CARA AONB FUND: Details and Application Form' (CARA, 4 April 2022) <https://www.cara-northdevon.co.uk/post/cara-aonb-fund-details-and-application-form>.

furthering the organisation's objects. While the AONB fund came partly from Parkdean's adverse costs, even this was arguably facilitated by the crowdfunding – without crowdfunding effectively, CARA's own lawyers would have needed to be paid from those adverse costs.

The money CARA raised through crowdfunding is, as indicated, being used to preserve the AONB. As part of this, CARA has become more formally engaged in planning matters, and has dedicated some of the remaining money as "a sort of legal money pot" for getting "specific legal advice on certain planning applications" (Member 2, CARA), particularly where planning issues will materially impact the AONB. Again, CARA has proven admirably careful here. It has noted the shortage of affordable housing stock to meet need in the area,[79] and made sure to avoid falling into the potential trap of litigating, that "you can start looking critically at all development in the area" and "get very, very negative" about the prospect of change (Member 1, CARA). It has used the money to instruct specialist lawyers on further matters, such as objecting to a development for five market value homes (in effect, holiday villas) on a site outside of the development boundary, on the basis of harm to the AONB and conflict with the soon-to-be-adopted Georgeham Parish Council Neighbourhood Plan.[80] In this way, the crowdfunds have contributed to building capacity and extending CARA's timeline to mobilise (quasi-)legal processes in pursuit of its core aim, preserving the AONB. One lawyer noted CARA represents a strong example of how communities can think longer-term about crowdfunding and judicial review, demonstrating the value of thinking about whether funds may be retained afterwards if successful, rather than going to a general charity. Ultimately, for other community groups to benefit from this accumulation of longer-term resource, it requires some strategic planning, including whether they have charitable status prior to using crowdfunding. It may be that such considerations are too long-term in practice, given the strict narrow time limits for litigation, and so these resource benefits are perhaps limited to a subset of crowdfunded litigants already with charitable or non-profit status.

To some extent, these considerations are subject to forces beyond organisations' control – whether they win a claim, not to mention the surprising development with the AONB fund in CARA's case, is not easily predictable. Clearly, these are far from generalisable observations –

[79] 'We're All About Protecting What's Important...' (CARA, 21 April 2022) <https://www.cara-northdevon.co.uk/post/we-re-all-about-protecting-what-s-important>.

[80] *Application 74488: Land adjacent to Langsfield Croyde Braunton Devon EX33 1QD, SUBMISSIONS ON BEHALF OF CARA* <https://mcusercontent.com/3b8b169d1f1acbd7fbdeeca39/files/a67bc756-f873-ac31-2bdb-581fb0df5185/CARA_Submissions_Application_74488.pdf_163338_1.pdf>.

though telling a story of how funds have been used by responsible groups, which might give us pause when thinking about this issue, they do not neutralise concerns about what happens to unused crowdfunds in other cases or systematically. For scholars of legal mobilisation (and indeed, perhaps civil society users of crowdfunding), these accounts also demonstrate the potential ongoing value of crowdfunding for generating monetary resource enabling further action beyond the judicial review, both in funding repeat access to legal processes, for the3million and ORG – a key feature of effective mobilisation – and meeting wider social and charitable objects, for CARA, a group not intending to litigate repeatedly. This capacity of crowdfunding to contribute to generating wider benefits for a group's aims, beyond simply funding one instance of litigation, is admittedly far from its primary function. It can, though, be very useful indeed, as Chapter Five expands upon.

A hostile landscape for legal mobilisation?

A proper discussion of crowdfunding's material role in opening up legal mobilisation must address the forces pushing to close public interest litigation – a form of litigation crowdfunding has made more visible. This hostility is arguably taking shape in three core forms: (i) pushback against campaign organisations' litigation from central government; (ii) a potential conservative doctrinal turn in the UK Supreme Court; and (iii) a turn to 'procedural rigour' in the Administrative Court and Court of Appeal. These developments demonstrate the legal opportunity structure is not static, but elastic and reactive – as some doors open for legal mobilisation, such as the bottom-up innovation of crowdfunding, others may be closed from above to restrain litigation for socio-political means. Discussion highlighting the potential for crowdfunding to facilitate polycentric litigation,[81] then, ought also to place this in the wider context of sources of attrition against public interest litigants.

Government pushback

At the same time as crowdfunding facilitates it, the government has been making several efforts to disrupt the use of the courts by campaign groups. Executive attempts to push back against policy impacts of judicial review are not new by any means. In 1960s France, Guy Braibant outlined three core tactics public authorities could employ to avoid implementing particular judgments: delaying the response, such as through appeals; retaking decisions through lawful

[81] See for instance Horne (n 1).

procedures; or legislating to validate action.[82] Carol Harlow noted a fourth option – 'simply disobey[ing]' decisions.[83] More recently, Harlow, with Richard Rawlings, has articulated the twin notions of 'striking back' and 'clamping down'.[84] The former again concerns government responses to individual judicial decisions, whereas the latter – 'pre-emptive action' preventing future judicial 'interference' – arguably represents a more strategic project (albeit still reacting to litigation patterns). This includes blunting substantive litigation via procedural changes, or amending the funding regime to inhibit claims.[85] The government may thus 'counter-attack' against other actors – notably, interest groups and the judiciary – to pre-emptively 'neuter the judicial role in the constitution'.[86] These observations mirror Rosenberg's critique of legal mobilisation, that litigation is a hollow 'fly-paper' luring progressive campaigners into court and inviting government backlash.[87]

Perhaps this Conservative government's most notable attempt to 'clamp down' on judicial review to date came in establishing the Independent Review of Administrative Law (IRAL), given an incredibly broad remit and a policy drive to restrict litigation used to conduct 'politics by another means'.[88] As one campaigner for Reclaim These Streets noted:

> while we were [litigating], the government was also saying that judicial reviews are spurious and everyone tries to do them and they're so easy, and it was literally the hardest two months I've ever had (Campaigner 1, Reclaim These Streets).

IRAL's Report was ultimately less concerning than feared by many administrative lawyers based on its terms of reference,[89] and the subsequent Judicial Review and Courts Act 2022 was

[82] Guy Braibant, 'Remarques sur L'efficacité des Annulations pour Excès de Pouvoir' [1961] EDCE 53.

[83] Carol Harlow, 'Administrative Reaction to Judicial Review' [1976] PL 116.

[84] Carol Harlow and Richard Rawlings, '"Striking Back" and "Clamping Down": An Alternative Perspective on Judicial Review' in John Bell et al (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing 2016).

[85] ibid 301.

[86] Richard Rawlings, 'Review, Revenge and Retreat' (2005) 68(3) MLR 378, 378, 381.

[87] Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (University of Chicago Press 1991), 341.

[88] *Independent Review of Administrative Law* (Ministry of Justice) <https://www.gov.uk/government/groups/independent-review-of-administrative-law>.

[89] Ministry of Justice, *The Independent Review of Administrative Law* (Cm 407, 2021). See Joanna Bell, 'Remedies in judicial review: confronting an intellectual blindspot' [2022] PL 200, 202.

thus limited in scope.[90] Nevertheless, this clearly signalled the government's approach to polycentric litigation, and is by no means the end of its policy drive. Similarly, while the Bill of Rights Bill 2022 – repealing the Human Rights Act (HRA) – has now been abandoned, its proposals clearly clamped down on the scope of 'judicial scrutiny of human rights protection', pre-empting future unwelcome judicial decisions.[91] In any event, the Bill's core aim of watering down the HRA may be achieved by the backdoor through legislative clauses disapplying application of s.3 HRA in particular statutes, such as the Illegal Migration Act.[92] Government pushback has not necessarily directly responded to crowdfunding specifically – other factors are certainly at play – although it is widely felt that IRAL was launched partly in response to the government's dislike of the two crowdfunded *Miller* cases regarding Brexit.[93] That said, crowdfunding has certainly increased the profile of public interest litigation – and of explicitly politicised public interest litigation at that, most notably the Good Law Project. Accordingly, some participants felt that members in government regard crowdfunding as encouraging campaign groups to bring more claims than could otherwise be risked, using donors' money rather than their own – a view some ministers have indeed expressed.[94] It is hardly unforeseeable that, in raising the visibility and accessibility of public interest litigation, it has also contributed to intensifying central government frustrations and desire to restrict judicial review.

It is often suggested that a core factor in the government's judicial review and human rights reform agenda is the influence of the Judicial Power Project (JPP), a wing of the Policy

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[90] Although the reforms it introduced were subject to considerable criticism, not least the exclusion of the Administrative Court's jurisdiction over permission to appeal decisions of the Upper Tribunal: Mikołaj Barczentewicz, '*Cart* Challenges, Empirical Methods, and Effectiveness of Judicial Review' (2021) 84(6) MLR 1360.

[91] Daniella Lock, 'Three Ways the Bill of Rights Bill Undermines UK Sovereignty' (UK Constitutional Law Association, 27 June 2022) <https://ukconstitutionallaw.org/2022/06/27/daniella-lock-three-ways-the-bill-of-rights-undermines-uk-sovereignty/>.

[92] Stuart Wallace, 'Death by a Thousand Cuts: The Human Rights Act' (The Constitution Society, 2 June 2023) <https://consoc.org.uk/death-by-a-thousand-cuts/>.

[93] Mark Elliott, 'Constitutional Adjudication and Constitutional Politics in the United Kingdom: The *Miller II* Case in Legal and Political Context' (2020) 16 European Constitutional Law Review 625, 644.

[94] The Rt Hon Suella Braverman KC MP, 'Judicial Review Trends and Forecasts 2021: Accountability and the Constitution' (Public Law Project Conference, London, 19 October 2021) <https://www.gov.uk/government/speeches/judicial-review-trends-and-forecasts-2021-accountability-and-the-constitution>.

Exchange think tank. The JPP focuses on the scope of judicial power in the constitution, seeking to redress judicial overreach of political decision-making and restore a traditional political constitution with the judiciary separated from political authority.[95] The JPP is incredibly controversial, with its criticisms of judicial overreach – articulated with political consequences in mind – criticised sharply (especially by Paul Craig) for overstating the issue when compared with empirical evidence from the caseload,[96] and relying on 'normative assumptions concerning the limits of what common law courts should be able to do that are highly contestable'.[97] The JPP is often felt to have the ear of the current Conservative government, and the government narrative around IRAL certainly mirrored its messaging on overreach. It is notable, then, that the right to rent case study, attracted the ire of the JPP and was criticised in a report advocating curtailment of judicial power.[98] One campaigner intervening in the case, for the National Residential Landlords Association, suggested the case "set the tone" for the government's recent actions, rueing that they "should've seen the writing much more clearly on the wall":

> one of the first reports out of the [JPP] basically moaning about JRs generally speaking actually mentions this case and mentions the JCWI and RLA's involvement in overturning a perfectly reasonable piece of Home Office decision-making … I think they saw the writing on the wall before we did and drew a thread much more strongly. And I think that report has ended up being very influential in the right wing of the government, and in the Conservative party's approach to JRs generally and has certainly underpinned everything that Dominic Raab is putting forward … this assault on judicial independence. And I think I failed to recognise at the time that there was a starting gun being fired … the attitude of people like Policy Exchange to that decision, they've drawn a thread right through. And we fired a starting gun for them more than for ourselves (Campaigner 1, NRLA).

The report, released after the JCWI won in the High Court but before its Court of Appeal defeat, argued the 'point of the litigation was to put political pressure on the government to abandon

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[95] Paul Craig, 'Judicial Power, the Judicial Power Project and the UK' (2017) 36(2) U Queensland LJ 355, 356. See also 'About the Judicial Power Project' (Judicial Power Project) <http://judicialpowerproject.org.uk/>.

[96] Paul Craig, 'Judicial review, methodology and reform' [2022] PL 19.

[97] Craig (n 95), 355.

[98] Richard Ekins, *Protecting the Constitution: How and why Parliament should limit judicial power* (Policy Exchange 2019), 21.

its policy, the merits of which should be for the political process to decide', stating the case emblematised the 'risk that human rights litigation will become politics by another means'.[99] Again, this demonstrates the dangers inherent in contentious legal mobilisation: frustrating elites, and those influential in elite circles, risks attracting pushback. As key designers of the judicial review system,[100] executive elites can respond through systematic restrictions on future litigation prospects.

What has been seen, perhaps more so than any concrete reform of public law litigation, is a strong central government narrative around judicial review, encouraged by voices like the JPP. Discussing the Home Office policy of sending asylum seekers to Rwanda, Tomlinson and others analyse the potential for 'executive entrapment' – where the government recognises, and generates, political opportunities from routinely criticising the legitimacy of judicial review, which can lay the groundwork for further clamping down.[101] Again, government narratives pushing an agenda of judicial review reform are hardly novel, though it is notable that, as discussed below, it appears the current narrative may to some degree influence the senior judiciary. Similarly, participants warned that narratives can distort the image of crowdfunding. One campaigner bemoaned the prominent "perspective" that "if you get the cash, you can bring anything, you can just do what you like" – in practice, mobilising public interest litigation is "a really, really risky thing" and is "not lightly taken" for many (Campaigner 1, the3million/ORG). The various attritions on access, and the fact crowdfunding is but one feature of a decision whether to litigate, is often obscured when discussing crowdfunding's dangers in opening the door to polycentric litigation. Narrative matters, and a highly partial perception of crowdfunded judicial review claims may be developing in the popular imaginary, which does not chime with many claimants' difficulties mobilising law.[102] The same campaigner summarised:

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[99] ibid.

[100] Joe Tomlinson and Alison Pickup, 'Reforming Judicial Review Costs Rules in an Age of Austerity' in Andrew Higgins (ed), *The Civil Procedure Rules at 20* (OUP 2020).

[101] Joe Tomlinson, Naoise Coakley and Roisin Gambroudes, 'It's a trap! The changing dynamics of executive engagements with judicial review' (UK Constitutional Law Association, 28 July 2022) <https://ukconstitutionallaw.org/2022/07/28/joe-tomlinson-naoise-coakley-and-roisin-gambroudes-its-a-trap-the-changing-dynamics-of-executive-engagements-with-judicial-review/>.

[102] Explored further in Part Three of the thesis.

> [T]he court isn't just some nebulous blob that doesn't have decision-making powers … And to suggest that us just walking into court and getting what we want is nonsense, and to present it in those terms is dangerous. I'm now alluding to this whole lefty lawyer woke nonsense that the government is intent on pushing at the moment … there is this perception of how the law works, and CrowdJustice is a part of that perception.

Executive pushback, substantive and narrative, is indicative of the malleability of the opportunity structure for legal mobilisation. Forging open routes to challenge elite actors, by crowdfunding, can invite those same system designers to shut off other routes and stifle activity. When focusing on the openings – crowdfunding – we must also place this in context of system designers' closing of opportunity.

A conservative judicial turn

The difficult environment for (crowdfunded) public interest litigants is not solely due to the executive. Judicial receptivity to policy arguments is widely acknowledged as a (more contingent) feature of legal opportunity for mobilisation,[103] and evidence of a doctrinal turn towards conservatism in the UK Supreme Court is growing – although not universally accepted. Under Lord Reed's presidency, many feel the Court has demonstrated a stricter adherence to the judiciary's limited and deferential role vis-à-vis the executive in the political constitution, more cautious to being dragged into contentious policy disputes than under, particularly, Lady Hale's stewardship.[104] Speculation abounds as to the causes of this apparent political constitutionalist turn – in truth a number of factors are likely relevant, some related to the Court's personnel,[105] and others the fractious political environment. Some commentators have plausibly suggested the Court may have adopted a more traditional and conservative approach to be seen as addressing concerns of overreach from the executive and the JPP.[106] The

[103] Chris Hilson, 'New social movements: the role of legal opportunity' (2002) 9(2) JEPP 238, 243; Lisa Conant et al, 'Mobilizing European law' (2018) JEPP 25(8) 1376, 1382.

[104] Conor Gearty, 'In the Shallow End' (2022) 44(2) London Review of Books; Lewis Graham, 'The Reed Court by Numbers: How Shallow is the "Shallow End"?' (UK Constitutional Law Association, 4 April 2022) <https://ukconstitutionallaw.org/2022/04/04/lewis-graham-the-reed-court-by-numbers-how-shallow-is-the-shallow-end%ef%bf%bc%ef%bf%bc/>.

[105] For instance, Tan focuses on Lord Sales' influence: Gabriel Tan, 'Children's rights and the influence of Lord Sales in the UKSC's political constitutionalist turn' (2022) 26 Edin.L.R. 93

[106] See for example Lee Marsons, 'Crossing the t's and dotting the i's: The turn to procedural rigour in judicial review' [2023] PL 29; Alexander Horne, 'Has the UK Supreme Court reformed itself?' *Prospect* (London, 5

most explicit expression of the Court's purported turn is probably *R (SC) v Secretary of State for Work and Pensions*,[107] which found lawful the Child Tax Credit (the 'two-child policy') measure.[108] Not only did Lord Reed's judgment, with which all judges agreed, show a problematic grasp of indirect discrimination,[109] it took a frankly insulting swipe at the Child Poverty Action Group, who had supported the claim and acted as the claimants' solicitors. It stated that challenges to legislation on discrimination grounds:

> are usually brought by campaigning organisations which lobbied unsuccessfully against the measure when it was being considered in Parliament, and then … [litigate] as a means of continuing their campaign.[110]

This sign of dislike for campaign groups' challenges to legislation resonates with the right to rent claim, where the Supreme Court (under Lord Reed's presidency) refused the JCWI permission to appeal its Court of Appeal loss. Case study participants expressed near-unanimous surprise and disappointment at this – understandably, given two tiers of court had acknowledged as a question of fact that the legislation caused direct discrimination. Several participants raised that this Supreme Court is more conservative than its predecessors and takes seriously its role as junior member of the constitution, and that this case neatly and sadly encapsulated the fraught situation in the Court. It was noted that the basis for refusal – a lack of clearly defined legal point – would not have stopped them granting permission if they wished, and certainly not in previous years. Some drew parallels with *R (SC)* and noted that these cases may indicate to the government that the climate in the Court of Appeal and Supreme Court is more benign, affording considerable deference. It was even raised that some in NGO legal circles are discussing not taking claims to the Supreme Court in case they worsen the law, suggesting that if the right to rent case had reached the Supreme Court, the claimants would likely have lost and it may have further damaged the policy space. Alongside the Supreme

August 2021) <https://www.prospectmagazine.co.uk/politics/supreme-court-lord-reed-reforming-itself-child-benefit-cap-law>.

[107] [2021] UKSC 26.

[108] For doctrinal discussion, see Tim Sayer, 'Manifest Unreasonableness in the UK Supreme Court: A Doctrine Working Itself Pure' (2022) 33(1) KLJ 122.

[109] For rightly sharp criticism, see Charlotte O'Brien, 'Inevitability as the New Discrimination Defence' (OHRH 26 July 2021) <https://ohrh.law.ox.ac.uk/inevitability-as-the-new-discrimination-defence-uk-supreme-court-mangles-indirect-discrimination-analysis-while-finding-the-two-child-limit-lawful/>.

[110] *R (SC)* (n 107) Lord Reed at [162].

Court's jurisprudence, one lawyer felt the Court of Appeal's approach in *JCWI* may contribute to entrenching a difficult landscape for public interest litigants:

> those bits from the Court of Appeal, which have then developed a couple of years later in [*SC*], they're critical of us and the JCWI in particular for having campaigned against it and tried to lobby Parliament against it and then when we lose just go to the courts … I wonder if you start to see those being trotted out by the Secretary of State, by local authorities, when it's challenges to, say, individual licensing schemes or challenges to low traffic networks … it's a nice paragraph to quote in a skeleton argument to say to a High Court judge 'get back in the box' (Lawyer 1, NRLA).

As with executive pushback, then, the right to rent was said to represent one of the (several) contentious polycentric cases which elites have reacted relatively strongly against, demonstrating the dilemma of mobilising law in intensely politicised contexts like immigration policy, and of crowdfunding for those purposes – in facilitating court access for policy battles, it may invite subsequent backlash.

Procedural rigour

While much focus of judicial tightening has predictably focused on doctrinal developments in the Supreme Court, Marsons rightly notes that a process of procedural tightening is ongoing in the Administrative Court and Court of Appeal which merits close attention,[111] a period increasingly termed a turn to 'procedural rigour'.[112] As Marsons states, judicial review procedure reflects the wider mood, 'underlying concerns', and 'structural pressures' facing the judiciary,[113] regulating court access in light of that mood.[114] Marsons identifies six facets of the turn to procedural rigour, with standing most relevant for present purposes. The law on standing, in England and Wales at least,[115] has been relatively settled since the 1990s, when a

[111] Marsons (n 106).

[112] Language first used by Singh LJ in *R (Talpada) v Secretary of State for the Home Department* [2018] EWCA Civ 841 at [67]. See also Joseph Thomas, 'The Need for Procedural Rigour in Judicial Review Cases' (2021) 26(1) JR 7.

[113] To use Sunkin's language: Maurice Sunkin, 'Judicial Review: Rights and Discretion in Public Law' (1983) 46(5) MLR 645, 653.

[114] Marsons (n 106), 29.

[115] The Scottish approach to standing, or title and interest, has been widened far more recently, per *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868 and *Walton v Scottish Ministers* [2012] UKSC 44.

series of cases saw court access expanded for groups litigating in the public interest without a direct personal interest in the issues at hand.[116] Following a period of stability, there now appears to be a tightening trend developing – though the doctrine itself remains relatively untouched, its application in some cases has been marked by scepticism of allowing campaign organisations into court.[117] Marsons identifies three cases signalling scepticism towards claimants' standing, all crowdfunded and involving the Good Law Project as (co-)claimants.[118] It is unclear quite how widely applicable this trend is – few campaign groups share the Good Law Project's breadth of areas of interest – but the IRAL did encourage 'courts to address expressly the issue of standing in proceedings that are brought before them, regardless of whether that issue is raised by the parties',[119] indicating winds of a wider change.

A campaigner in the Immigration Exemption case shared this sense of a shift in judicial approaches to standing:

> it was accepted in the immigration case that we had standing. We were lucky, I think, because when we issued it was in the aftermath of Brexit but also before there was a big trudge of public interest litigation cases … I think we were in a bit of a honeymoon period, to be honest. It's a different landscape now I have to say. And the question of standing and the question of corporate legitimacy to bring these cases is much more serious, and I think that's because of how things have changed very quickly over the past few years (Campaigner 1, the3million/ORG).

They also noted:

> I'm more terrified frankly of the standing and the public interest points than I am about the fundraising … the recent decisions … particularly around the Good Law Project,

[116] Such as *R v Inspectorate of Pollution and anor, ex p Greenpeace Ltd (No 2)* [1994] 4 All ER 329; *R (Greenpeace) v Secretary of State for Trade and Industry* [1999] All ER (D) 1232. For discussion, see Chris Hilson and Ian Cram, 'Judicial Review and Environmental Law – Is There a Coherent View of Standing' (1996) 16(1) LS 1.

[117] Marsons (n 106), 37.

[118] *R (All the Citizens and another) v Prime Minister and others* [2022] EWHC 960 (Admin), [2022] 1 W.L.R. 3748; *R (Good Law Project and another) v The Prime Minister and another* [2022] EWHC 298 (Admin); *R (Good Law Project) v Secretary of State for Health and Social Care* [2021] EWHC 346 (Admin), [2021] P.T.S.R. 1251. For another refusal of standing not mentioned, see *R (Good Law Project Ltd) v Secretary of State for Health and Social Care* [2022] EWHC 2468.

[119] Ministry of Justice (n 89), para 4.99.

> and the scathing that's happened about their standing … [show] it's not just about the money that you raised, there are … other really important parts of the litigation.

This is indicative of the elasticity of the legal opportunity structure, and its potential boomerang-like quality. As with political opportunities, there is a risk of conceptualising the features of legal procedures as static, when they are in fact produced by combinations of dynamic processes featuring a range of actors.[120] The litigation process is, of course, more structured than other fora for sustained activism, and the features structuring claims-making – standing, fees, costs rules, evidence rules – are relatively stable. However, they are certainly not static.[121] Accessibility improving in one realm – costs and funding, through crowdfunding and CCOs – draws attention to the use of courts for polycentric challenges, inviting an elite response. Accordingly, courts might be seen to apply greater deference in cases most directly engaging the political arena, per the Supreme Court's supposed doctrinal turn, and to regulate the caseload to weed out cases where standing appears more contentious. That the Good Law Project, an expressly political vehicle,[122] and the popular face of crowdfunding, has been the primary victim of the standing pushback so far is certainly telling. This aligns with Vanhala's prescient caution, in the environmental sector in 2012, prior to the Aarhus costs regime's introduction. Vanhala suggested that, if the costs situation improved, courts might reactively apply standing to again prove more difficult for campaigners.[123] The shape of one part of the opportunity structure may, then, be contingent upon the relative openness of its other constitutive parts. Early signs of this precise dynamic – a retreat on standing following improved financial prospects for a wider range of litigants – may be developing here. Indeed, it was even suggested that defendants might push more on standing if claimants' crowdfunding raises lower amounts, given the less compelling costs recovery incentive:

> if we raise £7,000, then they're going to … try and argue more on … the standing, push more on the public interest, and they'll say they've only got seven piddly grand, why

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[120] In the political realm see Doug McAdam, Sidney Tarrow and Charles Tilly, *Dynamics of Contention* (CUP 2001), 11-13.

[121] Celeste L Arrington, 'Hiding in Plain Sight: Pseudonymity and Participation in Legal Mobilization' (2019) 52(2) Comp.Pol.Stud. 310, 317-318.

[122] Jolyon Maugham KC, 'The Lawyer as Political Actor' (Annual Queen Mary University of London Law and Society Lecture, London, 16 November 2017) <https://waitingfortax.com/2017/11/17/the-lawyer-as-political-actor/>.

[123] Vanhala (n 28), 539.

should we proceed with a full whack judicial review … for the piddly risk that we're going to get a few measly grand (Campaigner 1, the3million/ORG).

So, crowdfunding represents one feature facilitating access to judicial review, which groups have used initiative to mobilise. Yet it may receive disproportionate focus in view of the various countervailing constraints on access exerted by key designers of the legal opportunity structure. This results in a distorted picture taking hold in some commentary of crowdfunding as an easy "race to the millions" for progressive litigants. To some degree, crowdfunding appears to intensify elite perceptions of courts as venues used inappropriately for 'politics by another means' which encourages polycentric cases that may otherwise not be brought – this might add weight to the critique that legal mobilisation provokes policy backlash.

Conclusion

This chapter has articulated crowdfunding's core, 'material' resource function enabling access to public law litigation. In doing so, it has made a core argument that, perhaps unexpectedly given prominent framings of disruption thus far, crowdfunding appears increasingly routinised in this field. This reinforces observations in Chapter Two that dispel some myths embedded in the popular image of crowdfunding, namely that it facilitates a litany of frivolous yet enormously profitable litigation. Placing it within the wider landscape of access to judicial review, crowdfunding appears important in facilitating legal mobilisation, filling some holes left by deficits in state and independent funding. Yet, in many cases, it seems insufficient on its own to open the courts to campaign groups. Rather, it exists alongside other mechanisms, especially costs-capping and claimant lawyers' flexibility on costs, regularly relying upon those to be effective. Without those mechanisms, it must be emphasised, crowdfunding simply would not work for many. These different tools constitute a messy patchwork of access to judicial review, with crowdfunding seemingly incorporated increasingly routinely into this patchwork. This picture is functional, yet far from comfortable, and does not entirely alleviate the financial risks, attritions, and stresses of judicial review. This interaction reveals a different tale than one of disruption and alarm – crowdfunding is now, it appears, a common and accepted feature of public interest litigation. Its implications and challenges seem relatively well-understood across parties, with Administrative Court judges using their procedural discretion to develop commendable approaches incorporating the resource within costs-capping.

Furthermore, rather than crowdfunding opening judicial review to unprincipled expansion, courts and the executive of course exert considerable control over the scope of legal mobilisation activity. These key system designers have not been averse to adapting the system and its procedure in ways that might be regarded as pushing back against increased visibility and use of public interest litigation from crowdfunding when deemed excessive. While crowdfunding is a bottom-up innovation in response to the dearth of state-funded access to justice, the courts and executive are top-down system designers – this power imbalance ought to be accounted for when considering the disruptive potential of crowdfunding. Notwithstanding more targeted efforts clamping down on its operation, crowdfunding is here to stay as an increasingly standardised feature of the legal opportunities for mobilisation – not least in the apparent absence of forthcoming reform to the legal opportunity structure regarding costs or legal aid funding. While an incredibly helpful feature, crowdfunding's capacity to (unduly) open public interest litigation should not be overstated amid a hostile landscape for legal mobilisation and the broader access to justice crisis in judicial review.

Chapter Five: More than a pot of gold? The non-material role of crowdfunding

Introduction

Is crowdfunding for judicial review simply a (very useful) pot of money protecting claimants from adverse costs risk? Or does it offer other, non-monetary resource benefits for legal mobilisation? This chapter conceptualises crowdfunding's non-material role, arguing the fundraising method can generate wider resource for movement-building and mobilisation in various ways, due to the distinctly public-facing nature of crowdfunding as a form of finance. The need to communicate to a wider public to seek donations, it argues, presents interesting opportunities for mobilising resource. These sorts of considerations might be anathema to some public lawyers, concerning as they do questions internal to the claimant organisations and their prospects for pursuing extra-legal aims. Yet they can be important features of organisations' uses of crowdfunding. To properly account for crowdfunding's use in litigation, these wider functions must be understood.

The chapter proceeds as follows, drawing on understandings of resource within legal mobilisation and social movement research outlined in Chapter One, which position resource more broadly than material finance, encompassing non-material normative and cultural resource. First, it argues that, in several case studies, crowdfunding offered opportunities to attract publicity and maintain pressure on elites around the judicial review claim. Second, and moving further out from the case, it suggests crowdfunding can present a cause around which to organise, potentially helping groups project support and galvanise wider campaigns, strengthen movement-building, and make legitimacy claims (albeit not unproblematically). Smaller-scale, localised, or grassroots campaigns might benefit most here. Third, it discusses the longer-term potential to aid groups in building resource for further action pursuing their wider aims. For instance, in some cases the act of seeking crowdfunding donations from the public has arguably informed internal shifts in groups' strategic priorities and identities. The chapter is, then, not suggested to represent an exhaustive account of how crowdfunding produces non-material resource – given the diverse normative roles it has played in just this small set of cases, it would be unsurprising if other dimensions were at play in different cases.

Publicity and pressure

It is well-established, as Chapter One outlined, that the resources conditioning productive and sustained legal mobilisation go well beyond the monetary. For crowdfunding, its material purpose is, of course, its primary function – without the practical need to fundraise for litigation, a campaign group would simply not bother crowdfunding, and could divert their time and energies to developing other resource strengths, such as publicity, allies, and networks. Yet the process of crowdfunding to meet that material costs risk can itself help to generate such non-material resources. Focusing on generating publicity, a valuable normative resource for legal mobilisation, this section argues that crowdfunding has helped galvanise publicity in multiple cases within the study, and demonstrates its role in maintaining extra-legal pressure on elites.

Crowdfunding, it appears, can contribute to not only facilitating legal challenges to public authorities' actions, but also the extra-legal pressure on those decision-makers accompanying a claim. Numerous participants across case studies raised that, even in a successful judicial review, the judgment itself rarely represents the end of the road for pursuing a group's aims. Indeed, with limited options for relief, where even a quashing order – which in some senses represents the court making its most emphatic and coercive statement to a public authority –[1] can result merely in the original decision being retaken lawfully.[2] Put another way, there is a now-familiar reservation that 'administrators usually can and do find some way to reach the same conclusion again despite the defects found by the court in the original decision.'[3] Accordingly, as Richardson and Sunkin observed in 1996, a claim's most significant effects might flow not from the decision but its accompanying publicity, especially where it focuses public attention on particular cases in contentious fields.[4] As one JCWI campaigner noted, "it's

[1] Maurice Sunkin and Varda Bondy, The Use and Effects of Judicial Review: Assumptions and the Empirical Evidence' in John Bell et al, *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing 2016), 349.

[2] Although some (cross-jurisdictional) empirical research of judicial review of executive action finds considerable impacts from quashing: Robin Creyke and John McMillan, 'The Operation of Judicial Review in Australia' in Marc Hertogh and Simon Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (CUP 2004); Peter H Schuck and E Donald Elliott, 'To the Chevron Station: An Empirical Study of Federal Administrative Law' [1990] Duke L.J. 984.

[3] Peter Cane, 'Understanding Judicial Review and its Impact' in Hertogh and Halliday (eds), *Judicial Review and Bureaucratic Impact* (n 2), 31.

[4] Genevra Richardson and Maurice Sunkin, 'Judicial review: questions of impact' [1996] PL 79, 88.

one thing to win the case, but to get them to actually change anything, you need the public scrutiny" – litigation without publicity is "not going to necessarily prompt any change."

> [C]rowdfunding … sits alongside judicial review and … the public facing comms are really important to getting change because, even if you win in the court, it needs public pressure or accountability for anything to actually happen. So that has also been a factor in making sure … people understand what's going on and … what is at stake in your cases because it goes beyond the court proceedings. (Campaigner 2, JCWI)

They felt that crowdfunding – in communicating directly to the public – can help prompt change by raising public awareness of injustices and encouraging engaged citizens to keep pressure on public authorities. Certainly, a donor to a crowdfunding page who then receives regular progress updates from the claimants might be more likely to engage in this manner. Similarly, 999 Call for the NHS, while crowdfunding for their claim, created an "action campaign checklist" encouraging members of the public interested in the campaign to take up action locally, alongside supporting the crowdfunding:

> we were saying that our big campaign is to stop these integrated care systems, because it is the end of the NHS for all … and one way we have of possibly stopping this is to go to judicial review, so that was our message. And on top of that … we were saying you can stop this in your area, and this is how you do it and basically we made a template of actions … which was go to your Joint Health Scrutiny Committee, go to your council meetings … don't just give us money for the judicial review, get off your ass and fight locally, and this is how you do it. (Campaigner 2, 999 Call for the NHS)

Accordingly, the fundraising effort was used as an opportunity not only to financially support the judicial review, but also to enrol concerned citizens into active campaign work in their local contexts – to paraphrase a slogan popular in climate campaigning, this encouraged thinking nationally, acting locally.

Similar observations were made – as to the value for accountability of encouraging communities to engage in the claim – by participants in the Up the Elephant coalition.

> [I]n a judicial review you don't know how the judge is going to see it, so it's really about keeping it in the eye, as well, of the public and just keeping that microscope on the situation, because … we know how … these property developers and the Council act when the microscope is on them, which is badly, so they're going to act even worse when the microscope isn't on them. So, the legal challenge and the demonstration

> outside it, it all keeps it within the public eye and within the conversation. (Campaigner 3, Up the Elephant)

The campaigners' determination in bringing the (unsuccessful) judicial review claim and the associated fundraising campaign was felt to have taken Southwark Council aback, and the case received considerable media attention, enabling the spotlight to remain on the issue. As an aside demonstrating judicial review's disciplining effect, the claimants achieved valuable concessions in pre-action correspondence, with the council acknowledging some errors in the section 106 agreement, resulting in increased provision of affordable housing in the eventual scheme.

Perhaps the starkest example among the case studies of the pressure exerted by a public-facing crowdfunding effort is the case of the Croyde Area Residents Association (CARA). After the claimants succeeded at first instance,[5] the interested party, Parkdean – the developer which owns the holiday park at issue – was granted permission to appeal, but later withdrew. This withdrawal was surprising, not least as their argument on a doctrinal point about a statutory bar was reasonably strong. Some suspect CARA's considerable media work around the crowdfunding appeal, which put significant local pressure on Parkdean, was partly responsible. Indeed, knowing Parkdean would view the webpage, CARA 'wanted them to know that there was the appetite out there to fund' the claim (Member 1, CARA). Concerned about loss of local goodwill, this may have contributed to Parkdean's decision to withdraw and make the costs proposal discussed in Chapter Four. In this way, then, just as media attention surrounding a case can form part of accountability and oversight,[6] crowdfunding can interact with that media attention to exert a similar effect, heightening the extra-legal pressure on elites around the litigation. One lawyer for CARA noted that crowdfunded cases necessarily need to have a media aspect to them, in order to get the money. In turn, the need to crowdfund focuses and distils the public campaigning efforts and media attention – the crowdfunding and publicity draw upon and bolster each other.

This reciprocal relationship demonstrates an apparent reality of crowdfunded public interest litigation – crowdfunding is a good feature adding thrust to the story of a case, which

[5] *R (Croyde Area Residents Association) v North Devon District Council* [2021] EWHC 646 (Admin); [2021] PTSR 1514.

[6] See for instance Jamila Michener, 'Civil Justice, Local Organizations, and Democracy' (2022) 122(5) Colum.L.Rev. 1389; Richard C Cortner, 'Strategies and Tactics of Litigants in Constitutional Cases' (1968) 17 J Pub L 287.

might help the claim be featured in, say, The Guardian. Meanwhile, featuring a case in The Guardian, with a hyperlink to the crowdfunding page, will itself likely aid fundraising. Participants regarded this as a self-fulfilling cycle – a crowdfunding page can help raise the issue's profile, and that associated publicity can promote the fundraising. The litigation brought by the3million and ORG exemplifies this mutually reinforcing dynamic, with Guardian articles published during the pre-action stages, linking to the CrowdJustice page,[7] to help reach the initial £10,000 target. From the beginning of May 2018, the groups' awareness-raising across channels all related to achieving donations. At a late stage in fundraising, in July, with limited time remaining and £4,000 still needing to be raised, the groups contacted Liam Byrne MP, a Home Office Minister in Tony Blair and Gordon Brown's Cabinets, to increase the claim's visibility. He authored an article in HuffPost discussing the immigration exemption and supporting the litigation, with a referral link provided.[8] The crowdfunding page subsequently raised the £4,000, £3,700 of which resulted from donors clicking the article's referral link. Crowdfunding, and the approaching fundraising deadline, thus gave the campaigners an urgent reason to spur on and crystallise communication and media attention.

Delivering impact through judicial review is, realistically, about far more than the claim itself, especially with limited capacity for merits review or powerful remedies. The intersection of crowdfunding and media publicity, then, adds pressure on public authorities and interested parties, raising public awareness of their conduct. This pressure can contribute to delivering change following successful litigation, or incentivise elites to settle claims out-of-court – or indeed to change their actions even when claimants lose in court, where there is a concurrent extra-legal victory in 'the court of public opinion'.[9]

At this stage, it is worth asking the following: is crowdfunding particularly novel in this regard? If, as is argued, an extra-legal publicity drive helps build pressure and motivates publics, is crowdfunding not at best an ancillary, and at worst an irrelevant, feature of this? After all, delivering pressure through publicity around litigation is far from a new

[7] Lisa O'Carroll, 'Ministers risk judicial review of plan to deny immigrants data access' *The Guardian* (London, 9 May 2018) <https://www.theguardian.com/uk-news/2018/may/09/judicial-review-government-plan-deny-immigrants-data-access>. All webpages in this chapter last accessed 11 September 2023 unless otherwise stated.

[8] Liam Byrne, 'Remove Access To Data And Injustice Will Follow' *HuffPost UK* (London, 6 July 2018) <https://www.huffingtonpost.co.uk/entry/home-office_uk_5b3f9f27e4b07b827cc02136>.

[9] Christopher J Hilson 'Environmental SLAPPs in the UK: threat or opportunity?' (2016) 25(2) Environmental Politics 248, 254.

phenomenon.[10] The normative resource of media publicity, it is true, exists perfectly well without crowdfunding – while crowdfunding and media attention can be mutually reinforcing, I do not argue that crowdfunding represents a fundamental shift in attracting media interest. However, crowdfunding is, interestingly, a tool used primarily for its material resource benefits, outlined in Chapter Four, which can also help non-materially wherein the act of raising money itself can galvanise campaigning and provide a focal point around which to motivate action and attention. It thus represents a multifaceted resource for campaigns, by virtue, crucially, of its distinctly public-facing nature, pitching directly to the public to support specific cases. This is especially valuable for one-shotter groups without existing supporter bases and experience mobilising media and public attention.

Galvanising the grassroots

In appealing directly to the public, crowdfunding represents a fundamentally grassroots method of litigation funding, compared with state provision or grant funding, where in essence an institutional middleman sits between the litigator and the public's preferences. The above section focused largely on putting pressure on decision-makers and elites; by contrast, this section looks to the task of engaging wider publics in campaigns through communicative strategies accompanying litigation that build a normative base of sympathy and support. This normative effect, it suggests, may be felt more keenly, although not exclusively, among less well-established groups, reverting attention to a recurring claim that crowdfunding may prove particularly transformative for less experienced groups and communities lacking existing resources of legal knowledge and communicative experience.

Law in the movement-building matrix

In appealing directly to the public, crowdfunding is well-placed to contribute to building capacity in campaigns, especially, it is argued, generating participation in grassroots and local causes and energising their communities. Both 999 Call for the NHS and Up the Elephant reflect this neatly. 999 Call's audience is "very much grassroots, we're not full of rich people" and comprised "£5, £10, £20 donator types" towards the crowdfunding (Campaigner 1, 999 Call). In a valuable form of public engagement, they used their crowdfunding page, one lawyer noted, "as a platform to raise awareness about the underlying issue that the case was about",

[10] See Richardson and Sunkin (n 4), 88.

representing "a useful tool to update supporters as the case developed" (Lawyer 2, 999 Call and JCWI). As such, campaigners felt the crowdfunding contributed to wider campaigning and generating grassroots support:

> [it] absolutely had a contribution to play in getting the message out about what was happening because so many people don't know, and actually asking people for money is, at the same time you're getting your word out about, 'look, this is what's happening to the NHS', and people might never have heard of this going on … and then they see a message on social media and they think … 'we'd better do something about this' … I don't think it would have been as effective if somebody had just come along and said 'here's seventy grand' … far less people would have heard our message. So it was in itself a campaign tool (Campaigner 4, 999 Call).

As discussed later, 999 Call later supported a second crowdfunded judicial review, *Khurana*,[11] with other NHS campaign organisations. In a campaign space characterised by fragmented and disparate activity following the 2019 election and Covid-19 pandemic, this claim and the associated crowdfunding meant that:

> for the first time in a long time, in almost two and a half years, the campaign community had a cause, we had something to rally around … it was a strong hook to get people interested (Campaigner 1, 999 Call).

This reflects that litigation, and fundraising to facilitate it, can provide a tangible focal point motivating action.

This is echoed strongly in the Up the Elephant campaign. The crowdfunding here was unusual, emphasising running in-person activities in the Elephant and Castle area, to fundraise among a geographically local donor base, primarily residents of Southwark, and those interested in social housing in London more widely. These events included a club night at DistriAndina, a local Colombian café and nightclub, screenings of a documentary film covering the development process,[12] and several demonstrations. Southwark Defend Council Housing, an organisation forming part of the Up the Elephant coalition, held stalls in the Elephant and Castle on Saturdays, disseminating leaflets and petitions. Around the core campaign was a

[11] *Khurana v North Central London Clinical Commissioning Group and anor* [2022] EWHC 384 (Admin).

[12] Emile Scott Burgoyne, 'Why Do Elephants Keep Developing? (Part 1/5) – documentary series (YouTube, 16 October 2019) <https://www.youtube.com/watch?v=EQ2M6_vQo2s&list=PLfNjfaZ0UWTjJ__VDYO6g82YfLsmWUO-->.

wider network in the community, and those associated with the University of the Arts London, an institution involved in the development. The in-person events (alongside tireless social media efforts led by Southwark Notes, a wing of the campaign) meaningfully connected with this local base, presenting unique dynamics for the fundraising and wider campaigning.

> [D]oing in person events was literally the best thing. Because there's only so much you can … get just through sharing stuff online, there's so many crowdfunding campaigns … it just really gets lost within the … galaxy of the Internet (Campaigner 3, Up the Elephant).

The events created "photo opportunities to show the wider community and the property developers and the Council that people really do care", while gathering groups "together in the same room" (Campaigner 3, Up the Elephant). The act of seeking fundraising, it was noted by multiple participants, can exert a "really powerful" effect galvanising a campaign and public engagement:

> even though asking for money is very painful and not a very British thing to do, I do think that it has huge potential if done well to galvanise a campaign … because as we know, judicial review, even when effective and successful can very often only delay a decision or quash it … so you're wanting to change hearts … and make the argument for why they should do something different next time. If you just have the litigation strategy you can't do that (Lawyer 2, Up the Elephant).

Again, campaigners observed that, although the need to crowdfund arises from a dearth of other funding options, actively fundraising among the community can help generate community engagement and dialogue, a beneficial feature of mobilisation:

> if you've got a campaign, you do need something to focus on … You have, then, the actual process of raising the money to go to court, so that's something else to focus on, so we had social events … you have to have speakers and you call people along, and then you've got to have people who are going to entertain you … it all starts to fit together if you have that kind of focus … if we'd had the money we could have done it without doing those things, but we didn't … it's all self-reinforcing, it's all reciprocating (Campaigner 1, Up the Elephant).

999 Call and Up the Elephant thus used agency to transform an inconvenient necessity – needing to crowdfund to litigate – into an ancillary benefit for legal-political mobilisation, forging opportunities for community-building and developing normative resource. Without Up

the Elephant crowdfunding, "there wouldn't have been the same focus, and the same urgency", with the judicial review regarded as "a means of building the campaign, and the crowdfunding is a means to a means of building the campaign"; the crowdfunding enabled "people who otherwise might not get involved" to "support the campaign and … become invested in it emotionally", and "express solidarity" (Campaigner 2, Up the Elephant). It represented a high-profile and "important part of building a wider community of supporters", comprising activities that engaged "people actively in the sense of not just handing over money, but they had to turn up, they were part of a discussion, they were part of a group activity" (Campaigner 2, Up the Elephant). This case demonstrates, then, how inviting communities to "buy into", support, and become invested in litigation and the "tangible wins and losses" of judicial review's various stages[13] "can be a powerful motivator" for a campaign, "getting people to think about the law or a particular issue in their communities" (Lawyer 2, Up the Elephant). Alongside its primary material function, crowdfunding can therefore help to generate some of litigation's potential 'radiating' indirect effects,[14] where campaigners build upon that opportunity, building capacity for sustained political mobilisation by generating public engagement and support.[15]

These experiences point to what several claimant lawyers suggested was common to many grassroots and local campaigns. One lawyer called crowdfunding a "very effective" tool in "serv[ing] two purposes". One is its material fundraising role; the other is providing campaigners:

> a platform to publicise their case and to generate interest and publicity that they otherwise might find quite difficult … a lot of our cases are about local campaign groups objecting to a particular issue, and it might be a group of local residents who aren't necessarily formalised in a particular way, but through the course of bringing the legal case and using crowdfunding … the two things combine and they create quite a nice hub for the campaign activities to revolve around (Lawyer 2, 999 Call and JCWI).

By contrast, the lawyer observed, some "more established clients" such as "bigger NGOs" with existing members might avoid crowdfunding, regarding "duplicating that with crowdfunding [as] asking those people to support them twice". They may instead utilise "internal budgets" or

[13] On which, see Chapter Seven's discussion of the temporalities of litigation and campaigning.

[14] Michael W McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (University of Chicago Press 1994), 10.

[15] Ellen Ann Andersen, *Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation* (University of Michigan Press 2004), 25.

"institutional funders rather than expecting the public to donate". Crowdfunding, then, appears especially well-suited to transforming the prospects of localised and inexperienced groups. Indeed, "for smaller groups who may not even have their own website, [crowdfunding is] like a free resource", as groups "can quite easily put together a template and then you've got the ability to reach out and communicate with your supporters" (Lawyer 2, 999 Call and JCWI). This is worth reflecting on. Another lawyer frequently involved in crowdfunded cases noted that they were aware of people trawling through CrowdJustice to understand what is happening in particular subject areas, such as environmental activism, a policy arena which Chapter Two shows is heavily represented by local community groups. In this way, they suggested, a community group launching a crowdfunding page can exert an educative and engagement function, promoting environmental activism in less dramatic ways than the direct action of Extinction Rebellion or Just Stop Oil, and mobilising a network potentially wider than the local supporter base by disseminating causes to new audiences.

It would be wrong, though, to characterise crowdfunding's movement-building role as entirely limited to small and locally-oriented groups. For the3million, a relatively young organisation founded in 2016 but which has become an influential litigant on EU rights, crowdfunding has proven "central" to their litigation campaign work and to "generating interest and mobilising an audience". As one campaigner summarised:

> the way to build interest in the campaign and your objectives is around focused clear issues, and a legal case is a fantastic way of building engagement in your work and your campaigns. People [are] not just giving money because they just feel like it, they're giving money because they feel a connection with the issue that you're dealing with, and by people giving money you're building an audience, you're building a campaign base of people to mobilise. When we talk about social justice, and when we talk about movement-building and campaigning, it's not just about people going down to Parliament Square and standing there with a picket and a flag … it's so much more, and donations and giving money is … a really good way of engaging people in an issue, and it's a really good way of saying … 'people do care because they're putting their money in the pocket'. And we build a mailing list from that … to say not only do we do this, but we're doing this, and if you're interested in that, please read our materials. So it is a really important part of building a social justice movement, because there's nothing like a legal case to really capture people's attention in an issue … it's really difficult to build interest in something by saying 'are you really upset about this

> problem, could you write a letter to your MP, please?' Most people are just going to go, 'are you for real, my MP is Dominic Raab … he's not going to give a damn about some of these social justice issues' … whereas you're saying to somebody could you give us a fiver to support to this greater thing, people do feel part of it (Campaigner 1, the3million/ORG).

As such, "done responsibly [crowdfunding is] a really important tool in strategic litigation" (Campaigner 1, the3million/ORG). Of note here is that the3million regards itself as 'the largest grassroots organisation for EU citizens in the UK' –[16] this grassroots status aligns neatly with crowdfunding's capacity to help generate a movement, and to confer a form of legitimacy in being able to demonstrate that they represent a base of supportive donors. This question of legitimacy is discussed, and problematised, below.

These accounts raise an important question: what is the importance of law in these campaigns? Might political mobilisation around a particular policy or development, accompanied with an online presence (and, perhaps, fundraising), deliver similar normative and substantive gains? Law appears important for at least two possible (co-existing) reasons. First, as outlined above, the public is said to intuitively understand litigation's "tangible wins and losses". Its concrete structure and linear timeline may, therefore, represent useful motivators around which a clearly communicable mobilisation can be generated and followed. Arrington notes that litigation is more structured in its processes than other sustained forms of activism.[17] This structural linearity appears important, enabling citizens to become engaged in judicial review's multiple stages, and offering discrete opportunities to communicate interim victories – or to use interim defeats to galvanise support for the subsequent stages. Chapter Seven further explores judicial review's linear temporality.

Yet another, more existential and identity-based, reason might also explain why law matters in these movements. Chapter One identified that identity politics can condition groups' adoption of political and legal strategies,[18] meaning the decision to mobilise law may be

[16] 'Our Story' (the3million) <https://the3million.org.uk/our-story>.

[17] Celeste L Arrington, 'Hiding in Plain Sight: Pseudonymity and Participation in Legal Mobilization' (2019) 52(2) Comp.Pol.Stud. 310, 317.

[18] Lisa Vanhala, 'Anti-discrimination policy actors and their use of litigation strategies: the influence of identity politics' (2009) 16(5) JEPP 738.

influenced by viewing litigation as an appropriate forum for resolving disputes,[19] drawing on 'logics of appropriateness'.[20] That law is neutral, concrete, and objective is an enduring idea,[21] and a belief prevalent within the UK – survey research evidences strong faith in law's neutrality in Great Britain (among others) when compared to other Western European countries.[22] Meanwhile, recent survey data indicate strong support in the UK for judicial forms of accountability regarding the role of government and the protection of human rights.[23] Contrary to tabloid headlines, trust in judges appears robust vis-à-vis elected politicians,[24] suggesting many may innately see litigation as an appropriate and legitimate method of executive accountability. This sense of law's appropriateness in dispute resolution resonates with the suggestion above that launching and contributing to crowdfunded litigation may represent participation in social action without the divisive direct action of protest groups. 'Accountability' itself has been something of a fashionable term of late, in relation to executive decision-making in Brexit and Covid-19, and the widespread perception of impartial and neutral judicial decision-making, especially when compared with executive decisions, might contribute to the normative power of invoking law in campaigns. The perception of judicial impartiality perhaps affords causes a particular claims-making power, as a 999 Call campaigner expressed:

> yes it's the establishment, but there has to be some good things about the establishment hopefully. So it felt good to be participating in that process too, I think, because otherwise you can easily be dismissed as campaign groups, just the rabble on the edge of the street with their placards and it gave us a chance to present ourselves in a whole new way (Campaigner 1, 999 Call).

[19] Sophie Jacquot and Tommaso Vitale, 'Law as weapon of the weak? A comparative analysis of legal mobilization by Roma and women's groups at the European level' (2014) 21(4) JEPP 587, 597.

[20] James G March and Johan P Olsen, 'The Logic of Appropriateness' in Robert E Goodin, Michael Moran, and Martin Rein (eds), *The Oxford Handbook of Public Policy* (2nd edn, OUP 2008).

[21] Thandiwe Matthews, 'Interrogating the Debates Around Lawfare and Legal Mobilization: A Literature Review' (2023) 15(1) JHRP 24, 24.

[22] James L Gibson and Gregory A Caldeira, 'The Legal Cultures of Europe' (1996) 30 L.& Soc'y Rev 55, 66.

[23] Alan Renwick et al, *Public Preferences for Integrity and Accountability in Politics* (The Constitution Unit, UCL 2023), 11-14.

[24] ibid 11.

This, it might be said, is the inverse of Rosenberg's framing of courts as an establishment tool ill-equipped to foster change:[25] if one *is* able to demonstrate that an establishment institution perceived as neutral, independent, and depoliticised has afforded a claim credence, this might be more persuasive than a political mobilisation that risks appearing highly partisan. Such concerns animate Chapter Eight's discussion of participants' legal consciousness.

Crucially, distinctly legal forms of accountability may hold an inherent appeal: something uniquely hard-edged is on offer. While, say, direct action enables a widespread show of support for a cause, there remains much to do to force the hand of the relevant authority. By contrast, a successful judicial review might see the (independent) judiciary declare an offending decision or policy as unlawful, and potentially quash it. Jolyon Maugham's book neatly demonstrates the allure of this promise of law. He notes that in 'judicial review proceedings, where Good Law Project is most active, public law can deliver hard-edged legal results'.[26] He articulates how law can be used to compel authorities to correct wrongs, though within limits:

> The hand of a good lawyer holds the mightiest pen. Its stroke can enlist the power of the State. If your arguments do persuade a judge that a global tech behemoth has broken the law, you can rely on the State to coerce it to comply.[27]
>
> [I]f you have a government that is hell-bent on ignoring the law there are limits to what the Court can do. They have the power to declare what the law is – and they have the power to say a thing should happen, like the prime minister should send a letter – but they don't have the power to ensure it does.[28]

Maugham is, in fairness, only too keen to identify law's limitations throughout his book, and to critique the notion judges are entirely neutral. Still, the idea clearly sustains that law is capable of 'hard-edged' accountability and change – why else would the Good Law Project build a model around repeat litigation? The sense that a legal result exerts a powerful and hard contribution to a policy issue also rears its head when Maugham suggests local communities could litigate against local authorities who breach their own climate emergency declarations.

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[25] Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (University of Chicago Press 1991), 341.

[26] Jolyon Maugham KC, *Bringing Down Goliath: How Good Law Can Topple the Powerful* (WH Allen 2023), 85.

[27] ibid 2.

[28] ibid 210.

Arguing that for 'a community, litigation can be a rallying point', he asserts that the 'combination of the galvanising effect of the litigation on campaigning with the political peril it created, and the possibility of a humiliating loss in court, would shift the conduct of local authorities'.[29] There is, it appears, an alluring vision in the public imaginary of adjudication as a hard-edged tool of political accountability, and the prospect of bringing a claim before an impartial judge can be normatively powerful for campaigns. Of course, this perceived hard-edge may be less straightforward in practice – even remedies might be less black and white than as thought in the public imaginary. Maugham is right to note that quashing is often the 'pinnacle of [litigants'] ambition', with a declaration of unlawfulness effectively reliant upon assuming 'someone will give a damn', anticipating 'that the real impacts will take place in the political sphere'.[30] Perhaps the myth of law, then, could outflank the reality of its potential for accountability – Chapter Eight discusses this. For now, it suffices to suggest that the idea of law plays a powerful role in engaging publics and making legitimacy claims, and crowdfunding adds to the dissemination and mobilisation of such ideas.

CrowdJustice as a knowledge resource

Promoting a case through crowdfunding, it appears, widens the scope of audiences to whom groups can pitch their causes. For pages hosted on CrowdJustice, this effect is optimised by the work of CrowdJustice itself. Little has changed in our understandings of the platform's role since Tomlinson observed in 2019 that CrowdJustice and similar platforms 'are now key players in this area and possess power to affect how fundraising campaigns operate.'[31] CrowdJustice has proven something of a controversial actor,[32] but, typical of the public debate around crowdfunding, detailed discussion about its contribution to the litigation crowdfunding field in practice has been lacking. Even the research on crowdfunding practice that has emerged since tends to focus, understandably, on the campaigners seeking funding, not considering in

[29] ibid 270-271.

[30] ibid 85-86.

[31] Joe Tomlinson, 'Crowdfunding public interest judicial reviews: a risky new resource and the case for a practical ethics' [2019] PL 166, 183.

[32] Not least after removing a page by barrister Allison Bailey, claiming language relating to trans people breached its terms and conditions, and capping fundraising at £60,000 on a holding page: 'Statement from CrowdJustice' (CrowdJustice, 2020) <https://www.crowdjustice.com/case/allison-baileys-case>.

any great depth the platform's unique contribution.[33] Tomlinson rightly noted the presence of platforms like CrowdJustice represents a material change to established practice in raising money for judicial reviews, given fundraising campaigns are centralised on a single website,[34] which exerts control over the forms and administration of fundraising campaigns.[35]

Participants' accounts across case studies demonstrate that CrowdJustice is no mere faceless host of campaigns providing a convenient space for a claim, adding little else, and claiming its fee (3% plus payment processing) in the process. Rather, campaigners and lawyers agreed, CrowdJustice is an active participant in the fundraising process, providing campaigners detailed expert guidance on matters such as developing a compelling appeal to the audience, tailoring their social media strategy, coordinating and timing a page's launch, and clarifying the common points of progress and plateau across a 30-day fundraising period. One Up the Elephant campaigner recounted:

> they said have donors lined up before the appeal goes live, so that you can really get off to a good start, because they say people give money if they see a successful appeal … they were very precise about it, they said, if you can get them to do it within the first minute or the first five minutes, or the first hour … you want to really get momentum going and get the ball rolling! (Campaigner 1, Up the Elephant).

Furthermore, case owners have access, on their CrowdJustice accounts, to a 'case owner dashboard', which tracks and provides statistics on the avenues from which donations arise and how much those donors pledge. Accordingly, campaigners can discern whether, for instance, Twitter, email lists, or Facebook are effective routes. CrowdJustice thus "equip them with the tools to be able to see what's working and what they can improve on" (Staff 1, CrowdJustice). In some instances, CrowdJustice also promotes details of cases to its own mailing lists, lists accumulated from donors to other crowdfunding pages who have agreed to receive information about cases in related areas. This interesting development is explored in Chapter Six. Suffice it to say for now that, while the numbers of people on these mailing lists remain publicly

[33] For instance Christopher McCorkindale and Aileen McHarg, 'Litigating Brexit' in Oran Doyle, Aileen McHarg, and Jo Murkens, *The Brexit Challenge for Ireland and the United Kingdom: Constitutions Under Pressure* (CUP 2021); Sam Guy, 'Access to justice on the market: An empirical case study on the dynamics of crowdfunding judicial reviews' [2021] PL 678; Andrew Tickell, 'The Continuation of Politics by Other Means: Crowdfunded Litigation in Scotland (2015–2021)' (2022) 26 Edin.L.R. 100.

[34] Tomlinson (n 31), 183.

[35] Joe Tomlinson, *Justice in the Digital State* (Policy Press 2019), 29.

unknown, a case being placed onto a list represents a significant opportunity to reach new audiences beyond a campaign's direct base, as does having a case promoted by CrowdJustice's Twitter account, with over 11,000 followers.

These dynamics add another dimension to the characterisation of CrowdJustice as a "free resource", notwithstanding the company's fee where cases reach funding targets. For one, CrowdJustice's advice enables claimants to tailor their crowdfunding efforts to appeal to the distinct rhythms of the crowdfunding 'game'. Equally, it is not hard to imagine that groups without existing resource will benefit in their longer-term communications strategies from advice of experts in communications and campaigning, and crucially from access to statistics demonstrating which avenues of communication are effective for reaching their base.

So far, this section has demonstrated that, especially for grassroots or small-scale groups in the case studies, crowdfunding has helped galvanise campaigns by providing a core focus around which to disseminate ideas and engage (sometimes new) audiences. As such, it contributes usefully to accumulating normative resources of publicity and a base of support, including giving localised and inexperienced groups opportunities to attract attention beyond their base. A powerful legitimacy claim for grassroots groups can be their status as guided and funded by broad bases of 'ordinary' supporters – this perceived legitimacy might itself represent an intangible resource associated with crowdfunding, yet not unproblematically.

Legitimacy and participation – a contentious affair

Legitimacy – and the ability for groups to project legitimacy to their twin addressees, policy elites and the wider public – can be regarded as a non-material normative resource important for sustaining legal mobilisation.[36] It is a powerful framing of a case, and a socially persuasive claim. To varying extents, some participants suggested that crowdfunding, as a grassroots and bottom-up method of fundraising directly from the populace, can confer legitimacy upon a particular cause. At perhaps the most straightforward end of this reasoning – although it would, I expect, nevertheless attract much resistance from those who dislike the crowdfunding model – Jolyon Maugham argued when interviewed that a successful crowdfunding campaign should strongly indicate a claimant's standing to bring a judicial review. He made this argument, it

[36] Mark Aspinwall, 'Legal mobilization without resources? How civil society organizations generate and share alternative resources in vulnerable communities' (2021) 48(2) J.L.Soc'y. 202, 210-211; Bob Edwards and John D McCarthy, 'Resources and Social Movement Mobilization' in David A Snow, Sarah A Soule and Hanspeter Kriesi (eds), *The Blackwell Companion to Social Movements* (Wiley-Blackwell 2004), 125.

should be noted, at a time when the Good Law Project began receiving pushback on standing, as Chapter Four discussed. Maugham suggested that "if you have 10 or 15,000 people donating to a crowdfunding page, people who very often aren't particularly wealthy, I think that should be relevant to standing questions", akin to unions having standing from being funded by members. He contrasted cases crowdfunded by a broad supporter base with the uncritical acceptance in the 1990s that wealthy journalist and House of Lords peer Lord Rees-Mogg had standing to litigate concerning the Maastricht Treaty, given his 'sincere concern for constitutional issues'.[37] Maugham was not alone in making this comparison. He did strongly caveat his claims on standing, noting that if the information provided on a crowdfunding page is insufficient or untruthful, judges would be entitled to question whether that claimant truly had a mandate.

This is relatively persuasive – a large donor base demonstrating faith in a particular litigant to advance a case they feel strongly about is compelling indication that the claimant is appropriate. However, arguments were also made of legitimacy, which are perhaps more contentious and risk unfortunate consequences for smaller-scale causes. Multiple interviewees, including Maugham, regarded crowdfunding as "democratising" justice funding, and indeed giving "a kind of legitimacy to litigation". Some lawyers and campaigners noted fundraising arises from "ordinary people" and grassroots supporters – "the £5, £10, £20 donator types", as discussed. Raising money was often said to give campaigners confidence that the litigation had a public interest and base of support. Similarly, crowdfunding was suggested to give "the public a voice" (Staff 1, CrowdJustice), and represent an intermediate mechanism connecting cases to the people they affect. In commenting on *Gardner and Harris*,[38] a crowdfunded judicial review challenging government policy on care homes early in the Covid-19 pandemic, Moore and Graham make a similar observation. They argue the claim, which saw the policies declared unlawful, reflected 'the anguish and loss felt by the relatives of thousands who died needlessly

[37] *R v Secretary of State for Foreign and Commonwealth Affairs ex p Rees-Mogg* [1993] EWHC Admin 4; [1994] 1 All ER 457.

[38] *R (Gardner and anor) v Secretary of State for Health and Social Care and ors* [2022] EWHC 967 (Admin); [2022] PTSR 1338.

in care homes', because it raised £144,065.[39] This was said to give the case 'symbolic significance' beyond its doctrinal implications.[40]

These accounts indicate that going to the public for financial support is often associated explicitly with conferring legitimacy on the claim and campaign. We see this in 999 Call's case, when updating their CrowdJustice page following their Court of Appeal hearing:

> We should all take heart in the fact that this has been a grassroots crowdfunded case and as campaigners we have made an impact in defending the NHS. We have always known that win or lose this case our campaign work will continue and that our campaign messages … [are] made even louder and clearer in the months to come.[41]

If campaigners can present crowdfunding as conferring greater legitimacy and symbolic significance, demonstrating broad support from 'ordinary' people, this is a persuasive and appealing narrative which could project importance and add leverage to campaigning work. Yet there is certainly reason for caution against endorsing too strongly a legitimacy derived from 'the crowd'. Undoubtedly, gains can be made in enabling citizens to participate actively in law in this way and express solidarity, and a large base of support can certainly breed confidence and evidence a cause's substantial public support. The obvious corollary to a claim of legitimacy from crowdfunding, though, is this: does a claim which crowdfunds a small amount of money therefore lack legitimacy?

It is by now axiomatic in debates on litigation crowdfunding to raise concern that a cause (or claimant's) relative popularity and newsworthiness might affect funding prospects and determine what 'the crowd' does and does not fund.[42] This resonates with scholarship, outlined in Chapter One, concerning access to justice and inequality, especially post-LASPO, that highlights the unfairness and arbitrariness associated with sacrificing the ideal of equal

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[39] Cathy Gardner, 'Help me hold the government to account for Covid-19 care home deaths' (CrowdJustice, 2020) <https://www.crowdjustice.com/case/care-home-deaths/>.

[40] Victoria L Moore and Luke D Graham, '*R (Gardner and Harris) v Secretary of State for Health and Social care and Others* [2022] EWHC 967: Scant regard for Covid-19 risk to care homes' (2022) 30(4) Med.L.Rev. 734, 743.

[41] 999 Call for the NHS, '#Justice4NHS – Stage 5 – Court of Appeal' (CrowdJustice, 2018) <https://www.crowdjustice.com/case/justice4nhs-stage5-courtofappeal/>.

[42] Tomlinson (n 31), 179; Guy (n 33), 685.

access to justice to economic factors, and reducing state funding of legal representation.[43] Interviewees expressed considerable concern to this effect, highlighting that crowdfunding resembles "populist justice", with fundraising potentially contingent on popularity and political salience such that some important cases are overlooked in favour of more attractive issues. Indeed, legitimacy claims based on numbers of donors might have perverse implications considering Chapter Four's discussion, expanded upon in Chapter Six, that indicates working-class and marginalised communities are unlikely to receive comparable support to causes more popular among the liberal middle class. Were legitimacy frames directly associated with crowdfunding, might a case's opponents, and sections of the press, be able to evidence an absence of support or democratic mandate behind a cause by reference to a limited crowdfunding campaign? Are we to say that a working-class localised grassroots campaign raising small sums has less of a claim to popular legitimacy than litigation by the Good Law Project? In some ways, the former claim might represent a remarkably authentic expression of a local cause. Any such development would represent an unfortunate parallel to the narratives reportedly employed by the Legal Aid Agency, discussed in Chapter Four, using high-profile and successful cases to undermine more localised efforts. To be clear, this concern is hypothetical at present, and it is not suggested that those adopting legitimacy frames would subscribe to a suggestion that poorly-funded claims are less legitimate. Rather, it indicates the uncomfortable logic concomitant with associating popular legitimacy with money.

The characterisation of crowdfunded litigation as populist is interesting and merits consideration. It seems unlikely that many, if any, crowdfunded judicial review campaigns could be regarded as forming part of populist movements, where the actors draw on a moralistic view of politics positioning elites as corrupt, and project a unique claim to speak on behalf of the 'real' people.[44] What is more, it appears odd at face value to characterise instances of public interest litigation as populist, when such litigation might be anathema to populists, seeking to defend minority interests and thwart executive ends using complex legal processes.[45] Harlow and Rawlings have recently argued that administrative law, as a top-down endeavour, ought to

[43] For instance contributions in Ellie Palmer et al (eds) *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart Publishing 2016); Jennifer Sigafoos and James Organ "What about the poor people's rights?' The dismantling of social citizenship through access to justice and welfare reform policy' (2021) 48(3) J.L.Soc'y 362.

[44] Jan-Werner Müller, *What Is Populism?* (Penguin, 2017), 19-20.

[45] Carol Harlow and Richard Rawlings, 'Populism and Administrative Law' (*LSE Law, Society and Economy Working Papers* 12/2023), 10.

heed populism's warning and take more seriously the value of a participatory system of public administration.[46] They do note that the judicial process itself is inherently participatory –[47] we could see crowdfunding as a uniquely participatory way of engaging broad publics in that process. There might be a populist style to the cadences of crowdfunding as a way of mobilising support for litigation, in effect using money to signal the will of a set of people. Hilson argues litigation is populist if it challenges elites, and is brought by a claimant considered to represent 'the people' or is supported financially by a populist movement; it may also be considered populist if the style of argument used in the litigation relies on narrative and emotive appeal.[48] Raising crowdfunds among "ordinary people" to litigate (somewhat on their behalf) against elites may have resonances with populist strategy, albeit perhaps drawing insufficiently on the 'us and them' discourse. Appeals to emotion and narrative on a crowdfunding page, especially in cases lacking legal merit, may be regarded as features of a populist style of fundraising, where issues invoking much public feeling attract funding at the expense of more obscure, potentially more meritorious, cases. As such, while cases themselves may not be classed as populist – to be clear, the thesis' case studies would not be – the ideational style of the crowdfunding model may echo populist strategies of claims-making. What this demonstrates in relation to crowdfunding as a normative resource is that, while campaigners can indeed evidence public support through effective crowdfunding, potentially adding normative force to demands, we should be wary of attaching too great an emphasis to fundraising sums, given its possible relationship to popularity and, ultimately, issues of class and other identity characteristics.

What connects the diverse accounts across case studies discussed in this section is the potential value of crowdfunding, as a distinctly public-facing way of funding litigation, in providing a focal point for politico-legal campaigning. This can enable groups to mobilise media publicity, with reference to a crowdfunding page's tangible and newsworthy nature; to engage the public; and to keep pressure on elites. This capacity of crowdfunding may be less transformative for organisations with existing non-material resource in communications expertise, such as the JCWI, but for groups less experienced in legal and policy communications and in movement-building, a crowdfunding campaign can offer a useful

[46] ibid.

[47] ibid 22.

[48] Chris Hilson, 'Law, courts and populism: climate change litigation and the narrative turn' in Susan M Sterett and Lee D Walker (eds), *Research Handbook on Law and Courts* (Edward Elgar 2019).

centrepiece around which extra-legal campaigning converges and normative resource is developed. The following section indicates that, in some cases, the effects of utilising crowdfunding may extend even further beyond the judicial review itself.

Building future action

So far, this chapter has discussed crowdfunding's role in galvanising campaigns around litigation, indicating litigation and the act of crowdfunding can represent focal points aiding the construction and growth of wider participation and action. Much of this, though, has addressed benefits running concurrent with the litigation itself – normative resource accumulated while groups are actively seeking funding. This section addresses the resource role crowdfunding might play for a group once the particular instance of litigation has passed. In many cases, crowdfunding is unlikely to play such a role, notwithstanding its aforementioned role in helping to generate a (potentially durable) base of support. There are, however, circumstances in which crowdfunding could be said to have contributed to organisations' prospects beyond the litigation. One feature in this vein was discussed in Chapter Four – the use of leftover funds in successful claims, with two case studies demonstrating the potential value for facilitating further litigation and wider activities promoting an organisation's core purposes. Those arose by virtue of crowdfunding's material role. Here, focus turns to how crowdfunding's non-material (normative and cultural) resource value can help to build longer-running action. The section proceeds by discussing, first, the accumulation of cultural resources of confidence and knowledge about legal processes; and second, possible effects exerted on organisations' internal priorities by using crowdfunding.

Accumulating cultural resource

It is hardly new to observe that the tangible experience of participating in litigation can strengthen confidence and knowledge in using legal processes.[49] A number of the case studies reflect this, with the availability of crowdfunding facilitating litigation which has, in turn, resulted in greater familiarity in navigating law. 999 Call campaigners noted the "confidence" they gained from the judicial review and "engag[ing] with that level of establishment process" (Campaigner 1, 999 Call). One campaigner noted how a member of another organisation once

[49] See for instance McCann (n 14); Jacqueline Kinghan and Lisa Vanhala, *Against Persons Unknown: A case study on the use of law by self-organised groups* (Public Law Project 2021); Carolyn Abbot, 'Losing the local? Public participation and legal expertise in planning law' (2020) 40(2) LS 269.

remarked that "999 always punches way above its weight", which they perceived as an accomplishment (Campaigner 1, 999 Call). As indicated above, 999 Call later became involved in the *Khurana* judicial review. The campaigners were added to an email thread with other NHS campaign groups concerning the takeover of GP surgeries by an American private company, Centene. Having litigated previously, 999 Call campaigners became part of "the natural committee" alongside others with judicial review experience, once litigation was proposed. The campaigners' experience of this second claim "was a lot easier" (Campaigner 2, 999 Call):

> our first one, there were only three of us really, and that was a hell of a lot of work. And the second one, because there were five or six of us on the sort of steering group, and because we'd all had … experience before, we weren't so shocked when the arguments came and the paperwork came … I think the more you do, the easier it gets (Campaigner 1, 999 Call).

This crowdfunding effort, which achieved its targets incredibly quickly,[50] was also regarded as easier, given the topic's emotive nature. As such, we see in 999 Call an organisation which, though its dominant campaigning tools have largely moved away from protest and litigation since the 2019 election and Covid-19 pandemic, is more confident and familiar with both judicial review and the means of bringing a claim via crowdfunding, when necessary. This confidence is a valuable cultural resource.

Meanwhile, though not in relation to litigation, CARA has gained confidence participating in planning processes following their judicial review. As one member noted, whereas previously they might have engaged in planning through, at most, getting "people to sign a petition", they had newfound confidence to engage in more formalised ways. It was felt there has recently been greater awareness of planning in the area, and CARA has contributed usefully, including making comments on the Georgeham Parish Council Neighbourhood Plan to assist the process.

> [T]he judicial review has given us the confidence to instruct professionals when we think they are needed … it's given us a skillset which we didn't have before, and it's

[50] NHS PATIENTS, 'Stop our GP practices being sold off to Centene USA' (CrowdJustice, 2021) <https://www.crowdjustice.com/case/stop-our-gp-practices-being-sold-off-to-centene/>; NHS Patients Want Centene Out, 'Stop the Centene Take-Over of our GP Surgeries' (CrowdJustice, 2021) <https://www.crowdjustice.com/case/stop-centene-takeover-stage2/>.

> given us the confidence that we can actually achieve things which we wouldn't otherwise have, before this happened we wouldn't have even entertained it really … and we are still using them (Member 1, CARA).

The3million has seen perhaps the starkest transformation from using judicial review and crowdfunding. The Immigration Exemption litigation, its first case of several, "definitely instilled the confidence in us an organisation, and as a movement, to do this kind of thing". While "the risks don't change", the group's "understanding of them" has improved, with experience removing "the fear of the unknown" (Campaigner 1, the3million/ORG). This familiarity with litigation extends to familiarity with the rhythms of crowdfunding itself: the3million have "found a way of communicating updates in a way that we would [previously] probably agonise over a lot more. It's become much more right brain than left brain". This is because "if you do something enough, it becomes more familiar"; when going through the process initially, "you have an anxiety about it" whereas they are "more familiar now with the furniture" (Campaigner 1, the3million/ORG).

These case study experiences indicate that crowdfunding can, in one sense, enable otherwise excluded groups to access litigation and its associated cultural resource benefits of confidence and knowledge, as well as raise groups' profile in their domain as actors to ally with and take seriously. In another sense, as the3million's experiences indicate, the rhythms of crowdfunded litigation specifically might also give rise to knowledge and familiarity with communicating a litigation strategy to the public.

Internal priorities

This sub-section discusses impacts of using crowdfunding to litigate which are perhaps unexpected and unplanned for, but result in developing organisational normative and cultural resource, in the form of internal identities and priorities. In each instance, the distinct act of communicating and promoting the case to seek funding, again in a direct public-facing endeavour, is argued to have helped influence how the organisations perceive themselves and make strategic choices. This resonates with Lisa Vanhala's research that helps account for how legal mobilisation can influences organisations' internal ideational shifts. Vanhala, studying the Centre for Biological Diversity's legal mobilisation in relation to the status of polar bears as endangered, demonstrates how engaging in litigation helped shape and coproduce features of

the NGO's own identity and strategic foci for the future.[51] This sub-section suggests that the act of crowdfunding as a feature of legal mobilisation, with its associated publicity and communication around particular litigation issues, might itself exert an ideational effect and strengthen organisations' mobilisation strategies and identities. This could produce sometimes unanticipated and unpredictable litigation impacts.

Engaging in the Immigration Exemption case, and its crowdfunding effort, has resulted in distinct ideational impacts for both the3million and ORG. For ORG, it was suggested at interview, the process of communicating to audiences to fundraise exerted an internal educative function: embedded in their communications strategy were certain assumptions that data protection features were understood, given their core audience tended to know the field. These assumptions were challenged when coordinating with the3million to promote the CrowdJustice page with a cohesive message, including addressing those interested in immigration issues but who did not necessarily share understandings of data subject rights. Accordingly, the groups engaged in a mutual, back-and-forth learning process understanding how to best meet both organisations' audiences and frame the call to action. The terminology ultimately chosen drew upon 'access to justice' and 'holding the government to account' rather than 'data rights' or 'fundamental rights', which was regarded as a useful process for ORG in understanding how data protection issues can be understood from another perspective, that is, an immigration-focused audience. Alongside the inter-organisational networks formed in challenging the exemption, this process broadened the organisation's experience of speaking about data beyond an audience working in data and computing, and demonstrated the value of engaging in issues which are practical and targeted at a particular audience, such as migrants. Ultimately the organisation has established a new funded workstream concerning migration and digital justice,[52] representing a significant change in working practice. As such, the convergence of policy issues in the litigation, and the challenge of communicating across sectors for fundraising purposes, has helped to produce in ORG a new strand of its organisational strategic priorities.

For the3million, the Immigration Exemption claim, and the availability of crowdfunding, has shaped litigation as a central plank in its identity. Crowdfunded litigation

[51] Lisa Vanhala, 'Coproducing the Endangered Polar Bear: Science, Climate Change, and Legal Mobilization' (2020) 42(2) Law and Policy 105.

[52] 'Migrant Digital Justice Programme' (Open Rights Group) <https://www.openrightsgroup.org/campaign/immigration-policy-project/>.

has, it was felt, "set [the] organisation apart from other organisations when you think about migrants' rights movements", as "part of that pantheon of organisations that have … stuck their head above the parapet and taken the risk", and has "instilled a sense of agency and identity" in the group (Campaigner 1, the3million/ORG). It has also, it was suggested, emboldened other groups in the sector to instruct lawyers and take risks. The organisation has also approached crowdfunding as a useful "corporate test" guiding "internal decision-making" regarding its litigation strategy:

> one thing that's really interesting about the sort of psychology, if you like, of the CrowdJustice funding in the context of these cases is that, if … you don't hit your target, that's a pretty good indication that you probably shouldn't be going ahead with [the claim] … we continue to feel that they are a good litmus test for the popularity of pursuing with something, because people are … giving you money on a specific cause … and if people aren't prepared to do that, that's a pretty good indicator that your constituency and the base that you're trying to represent aren't interested, and maybe you shouldn't bother (Campaigner 1, the3million/ORG).

In this way, crowdfunding is a de facto means for the organisation's base to express approval or otherwise on its litigation strategy. This encourages a "particular kind of accountability" to the base, in publicly "explaining clearly your choices to people who gave you money" (Campaigner 2, the3million/ORG). As such, crowdfunding represents a useful discipline for guiding strategic litigation choices according to the base's reaction. This might trigger concern regarding the marketisation of justice funding based on popularity, yet in this context – an organisation responsible to its existing core of supporters, which provides much of the funding – it is arguably an understandable and useful guide ensuring it reflects its base's interests, and that the organisation can litigate in future on areas of value to those it represents.

The last instance raised here is certainly unique, but neatly demonstrates unintended 'radiating' effects of crowdfunded litigation's on the group's internal cultural resource and identity. 999 Call, in promoting its judicial review to its prospective crowdfunding donors, chose pink and yellow as campaign colours. This decision was made so as to "go for optimism" – posts would be bright, eye-catching, and cheerful, standing out on social media feeds, in stark contrast to the "doom and gloom graphics" the group had previously employed and the white, black, and blue colour scheme typical of NHS campaigning (Campaigner 1, 999 Call). On the day of the Administrative Court hearing in Leeds, they encouraged supporters to demonstrate outside the court wearing the campaign colours, resulting in "a sea of pink and yellow". It was

felt that these bright colours "flavoured our campaign, really, that this was a good thing we were doing, it was hopeful", which "for raising money was also important" (Campaigner 1, 999 Call). Local groups around the country associated with 999 Call also began to adopt the pink and yellow colours, and the bright and hopeful colour scheme and optimistic identity have remained in the years since the litigation. While it was acknowledged that "[y]ou don't want to think of yourself as a brand because you're not selling anything", it certainly "helps to have a unified visual identity" (Campaigner 4, 999 Call). This development is far from trivial – the organisation, in promoting to an audience to crowdfund for a particular case, has made a choice as to its visual identity, and the meanings associated with this identity, that has remained with the campaign long after.

These experiences of identity-development flowing from litigation and crowdfunding support McCann's observations that litigation can have 'radiating' effects influencing the identities and aspirations of groups and supporters,[53] and Vanhala, that legal mobilisation can contribute to groups' ideational shifts. They also demonstrate that crowdfunding itself can bring with it unexpected opportunities to develop cultural resource and strategic priorities, due to the directly public-facing nature of its associated interactions and communications. More broadly, this section has argued that crowdfunding's contribution as a resource for groups is not limited to its material role in facilitating the litigation, or even its capacity as a normative resource galvanising campaigning and publicity around a focused activity. Rather, in some circumstances, although far from all, crowdfunding might contribute to building groups' capacity for further action. This includes, as Chapter Four discussed concerning CARA and the3million/ORG, providing money capable of use in future legal and extra-legal activities, thereby generating a longer timeline. It may also include enabling campaigners to access the cultural resource benefits of confidence and knowledge associated with litigation, and shaping the internal priorities, strategies, and even identities of the groups. For several of these, groups cannot necessarily plan these resource benefits in advance of crowdfunding – it is hardly dependable that crowdfunding will help produce such cultural resources. It is perhaps more appropriate, to borrow Andersen's metaphor, to regard crowdfunding here as an unpredictable 'match' to be lit –[54] when struck it could, sometimes and in the right circumstances, help

[53] McCann (n 14), 284-285.

[54] Andersen (n 15), 218.

produce positive radiating benefits for groups, generating non-material and longer-term resource.

Conclusion

Some of the considerations in this chapter may fall far outside the wheelhouse of traditional English and Welsh public law scholarship, discussing as they do the prospects of crowdfunding to boost extra-legal campaigns occurring around and alongside instance of litigation. The chapter has mapped a range of ways in which, in these selected case studies, crowdfunding's use has resulted in the accumulation of intangible resource. This includes generating normative resource in strengthening causes' publicity, in conjunction with the litigation itself, and increasing groups' capacity to influence the co-addressees of claims, elites and the wider public, and to generate and communicate support and legitimacy. It can also include building capacity for further action, for instance where the crowdfunding process might influence groups' priorities. The diversity of stories told across a few case studies indicate there will be a number of resource benefits to using crowdfunding beyond its core material function, many of which occur incidentally as a result of the focused, direct, and public-facing nature of communicating to a potential 'crowd'.

This analysis may sit uncomfortably with those keen to defend the integrity of limited judicial review of executive action from any elision of law with politics. There will of course be debate as to whether using crowdfunding (as with litigation) to form part of extra-legal campaigns going beyond a given case is legitimate. As a matter of empirical reality, though, this is nothing new. Many claims within the UK are, and have long been, brought by those with broader motivations;[55] many important decisions have come from litigation campaigns brought to further extra-legal goals;[56] and questions of judicial review's impact are inevitably tangled in the surrounding political context of opposition to the particular decision under challenge.[57]

[55] Albeit at any one time, this will likely be quantitatively small compared to the number of claims brought by individuals turning on the facts: Varda Bondy, Lucinda Platt and Maurice Sunkin, *The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences* (Public Law Project 2015), 21-24; Joanna Bell and Elizabeth Fisher, 'Exploring a year of administrative law adjudication in the Administrative Court' [2021] PL 505, 521.

[56] This is far from a recent phenomenon – see Carol Harlow and Richard Rawlings, *Pressure Through Law* (Routledge 1992).

[57] Richardson and Sunkin (n 4), 91.

That is to say, to deny the presence of extra-legal, indeed, political, involvement in judicial review and yearn for an approach to challenging executive bodies' decisions that is apolitical and concerned entirely with ensuring public law legality is wholly unrealistic. Crowdfunding's broader roles in generating non-material resource for campaigns, beyond its purely material contribution funding claims, are features of its use by groups, and ought to be understood if we are to properly account for the place of crowdfunding in litigation. Furthermore, judicial review claims of course remain subject to the permission filter and layers of court adjudication – though crowdfunded litigation may seek extra-legal effects, to suggest the court system is thus falling prey to crowdfunded campaigns is to overlook the agency of the bench. Part Three of the thesis now approaches a related issue – the challenges facing crowdfunded claimants, and the tensions embedded in the interaction between crowdfunding and the legal system.

Part III

Chapter Six: "The court isn't just some nebulous blob" – The Resource Burden of Crowdfunding Litigation

Introduction

Part Three turns to articulating limits on the use of crowdfunding for judicial review in pursuit of social change. Such limits, it argues, are exerted on claimants by public law's institutional architecture and by the power differentials of actors in the litigation process. These power relationships challenge the effectiveness of judicial review crowdfunding for social aims, and delimit the scope of institutionally-accepted action. The present chapter begins this endeavour, focusing upon the resource intensity of utilising crowdfunding. It highlights the range of organisational and emotional burdens associated by participants with the process of mobilising judicial review using crowdfunding.

The chapter makes a core argument here, thus far underappreciated in discussion around crowdfunding. The judicial review process can present a range of difficulties for claimants, especially those less familiar with litigating – these include the stressful costs risk, experiences of adversarial tactics, and volumes of paperwork. Crucially, though, the act of crowdfunding itself also brings additional burdens which claimants must navigate. The crowdfunding model, amid limited legal aid funding, sees responsibility for financing access to justice placed squarely upon claimants themselves, creating a further form of labour for claimants who already face considerable pressures and may be vulnerable. As such, crowdfunding, it is suggested, can bring resource difficulties and drains for claimants, particularly stress at managing the uncertain and often precarious fundraising process, within an already demanding piece of litigation. For some claimants, part of the stress associated with fundraising seemingly lies in the discomfort at needing to treat deeply-felt justiciable issues as products to be marketed to an audience of prospective donors. This market logic, embedded in the crowdfunding model, also indicates fundraising prospects are not shared equally among users, with arbitrary factors possibly influencing success or failure. In these ways, crowdfunding introduces a potentially seismic problematic shift in the types of languages and cadences that a litigant must speak in to be successful: a meritorious claim, it seems, is not enough (or, indeed, perhaps not necessary) – one should be able to communicate deservingness and public salience. The picture painted in this chapter, of claimants struggling amid the rigours of litigation and the bespoke challenges of going to the crowd, is a far cry from successive governments' characterisation of judicial review litigation as easily and spuriously brought. In these case studies, litigation was certainly not undertaken lightly.

The chapter is structured as follows. It first draws attention to the burdens upon individuals of bringing a judicial review – irrespective of whether using crowdfunding. Into that already fraught context, it then articulates for the first time the resource intensity of litigating using crowdfunding itself. Here, it highlights the time sink of fundraising and the uncomfortable act of marketing a justiciable claim. Finally, it notes that, in any event, crowdfunding appears beset by inequalities, as might be expected for a funding model so reliant on the wisdom of the market. This indicates that, for certain claimants and causes, crowdfunding may yield limited results, bringing the substantial resource burden and time sink into even sharper relief.

The burdens of litigation

Legal mobilisation scholarship has arguably paid insignificant attention, empirically or theoretically, to the labours and burdens placed on litigants when going through the arduous process of mobilising law. Access to justice research has highlighted that stress and uncertainty navigating legal proceedings can contribute to worsening mental health,[1] but even in that research field, further empirical research of the issue is needed.[2] Albeit in the context of a case study involving litigants with existing mental ill-health, meaning care should be taken around extrapolating findings to other mobilisation efforts, Vanhala and Kinghan detail how the process of mobilising judicial review can have both oppressive and empowering effects on litigants.[3] They note how the process can disempower individuals with mental health conditions, through adversarial interactions with public authority defendants – whose behaviour may be victimising and 'sneaky' when defending their claim – and through the emotionally and mentally draining nature of the process itself, with frequent high-pressured deadlines posing additional burdens to those with mental distress.[4] In these ways, the litigation

[1] Pascoe Pleasence et al, 'Mounting Problems: Further Evidence of the Social, Economic and Health Consequences of Civil Justice Problems' in Pascoe Pleasence, Alexy Buck and Nigel Balmer (eds), *Transforming Lives: Law and Social Process* (TSO 2007), 86-87.

[2] Catherine R Albiston & Rebecca L Sandefur, 'Expanding the Empirical Study of Access to Justice' (2013) 2013(1) Wis L Rev 101, 111.

[3] Lisa Vanhala and Jacqueline Kinghan, 'The 'madness' of accessing justice: legal mobilisation, welfare benefits and empowerment' (2022) 44(1) JSWFL 22.

[4] ibid 36-37.

process may actually compound the initial perceived wrong of the decision-maker.[5] Outside of the context of mental distress, the authors have also noted the stress of litigation, and associated media exposure, for vulnerable claimants,[6] and many of these observations resonate with and are supported by litigants' experiences in the present research.

Across the case studies, and particularly among less experienced litigants, participants frequently raised quite how stressful and emotionally burdensome litigation can be. As Campaigner 1 for Reclaim These Streets put it, "it's really hard to do a judicial review, it's not like this easy pancake thing where you're like 'oh I don't like that law, let me challenge it'." Numerous features underpinned the stress litigants experienced, including the daunting costs risk, the enormous volume of paperwork, and encountering defendants' adversarial responses. The costs risk was described variously as "scary" and "stressful", resulting in "real anxiety" at times. This mirrors Vanhala and Kinghan's observation that the costs risk, and the intensive application process for legal aid, acts as a barrier and emotional burden for litigants.[7] As a 999 Call campaigner suggested,

> the sheer amount of money that you have to raise in order to bring a judicial review, it's not very accessible to the little person on the street or the grassroots activist, due to the amount of money you have to raise. … you would like to think that that there is a just world, and you can access justice, but it very much comes with a high price tag. (Campaigner 4, 999 Call).

As in Vanhala and Kinghan's study, several participants here expressed their stress encountering adversarial defence tactics. This includes instances related to the above stress around costs, wherein a defence representative was reported to have pushed back against a proposed costs-capping agreement on the basis that the claimant owned a house which could be sold to pay adverse costs. In the face of these tactics and bluffs, intended to cause claimants to withdraw, claimant lawyers play an important role in reassuring and guiding clients. In the Reclaim These Streets case, it was felt that how the defendants "spoke about us in the internal documentation, about us being naïve but mouthy, and the words and the descriptions of us, was

[5] ibid 36.

[6] Jacqueline Kinghan and Lisa Vanhala, A*gainst Persons Unknown: A case study on the use of law by self-organised groups* (Public Law Project 2021), 20.

[7] Vanhala and Kinghan (n 3) 35.

pretty traumatic" (Campaigner 1, Reclaim These Streets). Indeed, they perceived that these attempts to discredit them were "gaslighting" and "had no relation with reality":

> the idea that we were these shooting from the hips crazy women, we had the best human rights lawyers with us for every step of it, it wasn't like we were just making shit up – we weren't representing ourselves. But the way they spoke of us, and even in court … it was so crazy the shit they were saying, but it was the arrogance, that we just weren't smart enough to deal with it.

In the Immigration Exemption claim, campaigners with prior litigation experience were able to reassure inexperienced colleagues, when facing government pushback during "the rough and tumble of litigation".

> I know what these noises mean, I know that the government is going to paint us to be the complete demon and the devil for bringing this case and how dare we dream even of doing it, but the journey was more for my colleagues and the organisation. And people need a lot of reassurance, and a lot of explaining about the stages, the steps, the risks and … we talked through each stage and what it meant and what it would look like to alleviate that anxiety. So when we did get over the top nasty correspondence, as you do in litigation … you'd say to people, this is the game, this is how it's played and … not everything that's said is on face value … it's really important to guide people through those steps in a very sensitive inclusive way so that people are alive to the risks, but also the realities of those risks and they're not sort of being gaslit, if you like, into thinking that something is what it isn't. (Campaigner 1, the3million/ORG).

These experiences demonstrate the value of less experienced actors being reassured by lawyers and colleagues familiar with the rigours of the process, combatting tactics aimed at encouraging pre-action attrition.

The third key form of resource burden associated with mobilising judicial review observed here is the volume of paperwork and documentation. For Reclaim These Streets, the emotional labour from reading paperwork pertaining to their case contributed to the litigation process being:

> pretty traumatic at times. It's one thing when you're doing it and you're in high octane mode and you're just like go, go, go, and you're doing press and you're talking about and thinking about it. It's very different to be reading 2,000 pages of documents at

> Christmas, with your family around, reading how close you came to going to jail or ruining your life. (Campaigner 1, Reclaim These Streets).

For 999 Call, campaigners contrasted their difficulty handling the volume of paperwork as inexperienced litigators in their first claim, with the more manageable experience in the later *Khurana* litigation,[8] which they contributed to alongside other NHS campaigners.

> Hours and hours of trawling through paperwork and solicitor talk. Our first one, there were only three of us really, and that was a hell of a lot of work. And the second one, because there were five or six of us on the steering group, and because we'd all had the experience before, we weren't so shocked when the skeleton arguments came and the paperwork came … We knew they'd be big documents … the more you do, the easier it gets. (Campaigner 1, 999 Call).

Again, this demonstrates the value of practical knowledge of the process borne from experience. Similarly, Up the Elephant campaigners compared prior experiences of preparing paperwork without legal representation, for instance for Compulsory Purchase Order inquiries, to preparing for the litigation with solicitors and barristers: "we were relieved of quite a lot of the burden of the work. In previous legal challenges, we'd had to do … the solicitor's work", needing "to prepare the paperwork" (Campaigner 1, Up the Elephant). Across case studies, litigants praised claimant lawyers as providing reassurance, easing emotional burdens, and clearly explaining otherwise alienating and intimidating processes, including on costs.

Participants explicitly contrasted the emotional burden and stress experienced when litigating with dominant political narratives framing judicial review as spurious and too easy of access for socio-political actors.

> [W]e knew it was a lot of hard work and we knew we'd have to raise funds and all the rest of it. So it's not something you do lightly. You would get the impression, I know, of listening to the government who wants to curtail the possibility of people mounting judicial reviews, you do tend to get the impression that people think you just turn up on the court doorstep and the judge says 'come on in and let's hear what you have to say', it's not like that at all. It's really tough. And so I don't believe anybody goes for a judicial review unless they're really committed to it. (Campaigner 1, Up the Elephant).

[8] *Khurana v North Central London Clinical Commissioning Group and anor* [2022] EWHC 384 (Admin).

> [W]hile we were doing it, the government was also saying that judicial reviews are spurious and everyone tries to do them and they're so easy, and it was literally the hardest two months I've ever had, getting that money and getting it over the line (Campaigner 1, Reclaim These Streets).
>
> [Y]ou are not going to bring a case unless you are prepared to [face] the cost and the reputational risk, along with those very probing legal tests … of standing, corporate competence, the public interest and the money. It's tough … there is this perspective that seems to be developing that if you get the cash, you can bring anything … That's rubbish, it's utter rubbish. (Campaigner 1, the3million/ORG).
>
> [T]he court isn't just some nebulous blob that doesn't have decision-making powers. It most certainly does have all this power and control. And to suggest that us just walking into court and getting what we want is nonsense. (Campaigner 1, the3million/ORG).

The place of stress and emotional burden associated with litigating is underplayed both when conceptualising experiences of legal mobilisation, and when debating judicial power. Far from some popular conceptions of polycentric litigation, then, these case studies highlight that even when crowdfunded, judicial reviews are certainly not brought lightly, especially in view of the forces of attrition exerted by the process, and reportedly in some cases, defendants' adversarial tactics. The following sub-section examines the additional burdens that using crowdfunding to support claims may itself place on litigants.

Crowdfunding as a resource sink

Embedded, arguably, in accounts of crowdfunding that frame the resource primarily as a 'digital wild west',[9] are assumptions that fundraising is easy. In these accounts, the fundraising process itself is, frustratingly, something of a black box, where we observe crowdfunding's inputs and outputs without appreciating its internal processes.[10] Campaigners launch a

[9] Alexander Horne, 'Why crowdfunding legal cases is a recipe for disaster' *Prospect* (London, 20 April 2022) <https://www.prospectmagazine.co.uk/politics/why-crowdfunding-legal-cases-is-a-recipe-for-disaster>. All webpages in this chapter last accessed 11 September 2023 unless otherwise stated.

[10] On 'black boxes', see Mario Bunge, 'A General Black Box Theory' (1963) 30(4) Philosophy of Science 346. This concept has been used to describe understanding the crowdfunding process: Mark Simon et al, 'A multi-method study of social ties and crowdfunding success: Opening the black box to get the cash inside' (2019) 104 Journal of Business Research 206.

crowdfunding appeal (the input) and raise money (the output), and the apparent ease with which they do so is treated as problematic but unexamined. Of course, in some outlying high-profile cases discussed in Chapter Two, this may be a fair characterisation, but this will rarely be so. As Chapter Two comprehensively established, most litigants do not crowdfund anything like enough money for concerns around a 'wild west' and misusing funds to arise. Yet there is another dimension here. Not only is the fundraising usually far lower than emphasised by commentary focused on outlying cases, the hitherto understudied process of crowdfunding also looks far different, in these case studies, from the easy success implied by the 'wild west' characterisation. This sub-section explores this dynamic, drawing upon research beyond the litigation context that conceptualises crowdfunding as a form of resource-intensive labour adopted by crowdfunding users who are responsibilised to provide public goods via private means. Crucially, I argue this resource intensity and the emotional burden of turning to crowdfunding to litigate, is intensified by the incongruity of needing to market one's public interest justiciable problem as a product.

While the nascent research agenda on litigation crowdfunding lags behind, social science research predominantly in media and communications has begun to conceptualise the significant practical and emotional labour demanded of those using crowdfunding to stand any chance of success – and even so, often with limited results for those lacking pre-existing resources.[11] Hunter has argued, in her study of journalists fundraising to support their reporting, that crowdfunding resembles a second full-time job.[12] The process, she suggests, is all-encompassing and extremely time-consuming, requiring intensive social media outreach to potential donors over several weeks, resulting in an experience which most study participants found exhausting and stressful, especially alongside their regular jobs.[13] In this way, we see the interconnection of crowdfunding's practical and emotional demands, most clearly distilled in the exhausting act of social media outreach. Davidson and Poor, studying artists' use of crowdfunding, suggest the process, in placing fundraisers in uniquely direct and intensive interaction with their backers, places acute emotional demands on fundraisers. They must cater directly to their audience's expectations and manage their feelings through communications, to

[11] Chris Barcelos 'The Affective Politics of Care in Trans Crowdfunding' (2022) 9(1) TSQ 28.

[12] Andrea Hunter, '"It's like having a second full time job": Crowdfunding, journalism and labour' (2016) 10(2) Journalism Practice 217.

[13] ibid 223.

create a pleasant user experience with a view to soliciting donations.[14] Direct interaction with backers, I have argued in Chapter Five, makes crowdfunding distinct as a way of galvanising a campaign, yet it may also place heightened emotional burdens upon those raising the money compared to appealing to, say, wealthy individuals and institutions. Across case studies, the act of promoting cases on social media was regularly regarded as an incredibly intensive and stressful "time sink" that involved constantly seeking money from supporters on social media and searching for new audiences to ask for money. It was noted that, despite this time-intensity, raising substantial (or even the required) funds is not a guarantee, and the process itself is not resource-free but intensive, potentially demanding other resources in an organisation to be set aside to focus on reaching targets.

The efforts of 999 Call for the NHS exemplify this vividly. Around nine people, nicknamed the organisation's "social media deities", promoted the crowdfunding on social media, including developing a spreadsheet comprising various NHS campaign groups' localised Facebook pages and groups. Dividing the workload between geographical regions – for instance, one campaigner would post in Facebook pages of local groups based in Yorkshire, another in Lancashire, and so on – they joined, in total, around 80 Facebook groups and posted information and links about the judicial review and crowdfunding. They designed infographics to distribute across the regions, containing a core body of text, and some campaigners added detail at the end of the post to demonstrate how national changes to NHS contracting would resonate with and affect developments in the particular region. Given this regional angle, framed as doing homework on the target audience to make the case appeal locally, people could recognise the issue's relevance to their local service provision. Campaigners would push lots of different but related posts onto Facebook groups, including posts about hitting financial targets or thanking donors. This kept 999 Call's appeals high on the timelines and news feeds of Facebook group members. Some campaigners had sales experience and regarded crowdfunding like a product to be sold and marketed, and it became routine to run social media in the evenings. This account demonstrates the sheer degree of coordination and time-intensity devoted to social media, even when distributed among a network of campaigners larger than that of many (inexperienced) groups who crowdfund. Even considering this extensive effort, campaigners still found fundraising "nerve-wracking":

[14] Roei Davidson and Nathaniel Poor, 'The barriers facing artists' use of crowdfunding platforms: Personality, emotional labor, and going to the well one too many times' (2015) 17(2) New Media & Society 289, 293.

> we achieved our stretch targets on every stage. We had three stages … it was really slow, we were pushing up to the deadline to get it, and … it was exhausting and it was stressful and worrying (Campaigner 4, 999 Call).

The donor base did not have deep pockets, leading to the slow fundraising, and campaigners had to create new material at each stage of the fundraising and justify why they still needed further funding. This resonates with experiences in the Up the Elephant campaign where, looking to a donor base of modest means that was primarily locally-based in Southwark, the campaigners needed to be active. This included a raft of in-person events, and through generating a "Twitterstorm", that is, a period of intense online promotion tweeting and retweeting information on a topic. As Chapter Five argued, this active and in-person fundraising was central to effectively generating engagement, but the strategy nonetheless required "hard work" and "took a hell of a lot of time", including developing "social media graphics" (Campaigner 2, Up the Elephant). These cases demonstrate the interrelationship of the practical burdens of social media outreach and the stress regarding whether litigants will be able to proceed in challenging a perceived injustice. This tension, in the need to market a justiciable issue, is explored subsequently.

In understanding the forms of labour embedded in crowdfunding and the relationship to the wider architecture of access to justice, responsibilisation represents a useful framework. Discourses of responsibilisation promote individuals and communities actively adopting responsibility to address their problems, thereby transferring responsibility for collective goods from the state to the individual.[15] The concept has developed within Foucauldian accounts of governmentality, that is, the process by which the governed actively participate in self-government through self-improvement, thus maintaining existing power structures.[16] The responsibilisation of citizenship is somewhat Janus-faced – proponents argue communities and

[15] Susanna Trnka and Catherine Trundle, 'Competing Responsibilities: Moving Beyond Neoliberal Responsibilisation' (2014) 24(2) Anthropological Forum 136; Hilary Sommerlad and Peter Sanderson, 'Social justice on the margins: the future of the not for profit sector as providers of legal advice in England and Wales' (2013) 35(3) JSWFL 305; Jana Posmek, 'Precarious membership through the lens of ecological responsibilisation' (2023) JYS (EarlyView).

[16] Michel Foucault, 'Governmentality' in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality* (University of Chicago Press 1991).

individuals can become rights-bearing and empowered active citizens,[17] which aligns somewhat with perceptions expressed by participants in Chapter Five of litigation crowdfunding as legitimising and empowering. Yet critics rightly note the disciplining features of this form of 'governance at a distance' which uphold power structures,[18] and, in the welfare context, there is clear risk in the state withdrawing support wielding this legitimising discourse. The Coalition government's neoliberal Big Society policy agenda,[19] and the swingeing legal aid cuts in LASPO 2012 as part of this, are certainly predicated on discourses of responsibilisation, shifting responsibility for resolving citizens' justiciable problems increasingly from the state and onto affected individuals as 'responsible consumers',[20] withdrawing state-funded representation and expecting individuals to be self-reliant and take responsibility.[21] Crowdfunding, which Chapter Four framed as a marketised response to legal aid cuts, arguably continues, rather than resists, this logic of responsibilisation: reducing legal aid shifted the funding burden further toward citizens, and those who subsequently crowdfund adopt their responsibility as active citizens, but must also adopt additional burdens. Crucially here, I argue crowdfunding enrols its users into a distinct, at times uncomfortable, way of justifying their cause as worthy of public investment, almost inevitable when promoting a case to an audience. For one, crowdfunding has an embedded logic of deservingness – in making and promoting their pitch, users must justify why they, as good responsibilised citizens, deserve their audience's funding.[22] As participants noted, the crowdfunding ecosystem is ultimately finite and, to an extent, zero sum – if donors decide to fund one claim, they may not be able to support another. Second, the emphasis on actively and directly seeking funding from the public, as Hunter notes in studying journalists, means the types of labour demanded of users include thinking about marketing and asking for money, in ways they are often unfamiliar with and

[17] Steven Robins, *Rethinking Rights and Responsibilities in a Time of AIDS* (Eldis HIV and AIDS Resource Guide 2005) <https://www.eldis.org/document/A21522>; Steven Robins, 'From 'Medical Miracles' to Normal(ised) Medicine: AIDS Treatment, Activism and Citizenship in the UK and South Africa' (2005) IDS Working Paper 252.

[18] Nadine Beckmann, 'Responding to medical crises: AIDS treatment, responsibilisation and the logic of choice' (2013) 20(2) Anthropology & Medicine 160, 163.

[19] Steve Corbett and Alan Walker, 'The big society: Rediscovery of 'the social' or rhetorical fig-leaf for neo-liberalism?' (2013) 33(3) Critical Social Policy 451.

[20] Sommerlad and Sanderson (n 15), 320-321.

[21] Jess Mant, 'Neoliberalism, family law and the cost of access to justice' (2017) 39(2) JSWFL 246, 253.

[22] Caitlin Neuwelt-Kearns et al, 'Getting the crowd to care: Marketing illness through health-related crowdfunding in Aotearoa New Zealand' (2021) 0(0) EPA Economy and Space.

which can make some uncomfortable.[23] In non-investment-based crowdfunding, such as funding judicial review claims, the challenge of marketing includes thinking how to market something intangible to altruistic donors, absent a 'product' that rewards donations.[24]

This awkwardness around seeking money may add to the emotional labour and intensity of the process – litigants who feel strongly about their public interest justiciable problems must now adapt to framing their claims in marketing terms or risk not being able to proceed. As a campaigner in the right to rent case suggested, crowdfunding is "tough from a lawyer's perspective, because once you start with crowdfunding you have to get into elements of mass advertising which … [lawyers are] not particularly good at!" (Campaigner 1, Residential Landlords Association). They noted "it is very difficult to break through beyond the 'yes, this is important and interesting' to 'this is important and interesting and I should give you some money'." In this vein, one Reclaim These Streets campaigner recounted how they "really did not enjoy" the "excruciating" process of needing "to ask and to continue to ask and to beg" for funding via social media and personal emails:

> It was hat in hand to a lot of people that I've worked with in the past and … I really have never asked anybody for money and I hated it, like viscerally just hated the whole process. (Campaigner 1, Reclaim These Streets).

The precarity of needing funds for the claim to proceed was perceived as "hell":

> Hell in May and June and very, very upsetting … because it was very much do or die. If we didn't hit that £25,000 mark it wasn't going to happen, and it was super, super stressful, but once we hit the £25,000 mark … then it kind of receded into the background. But then it all kind of bubbled to the top again when thinking that they were going to appeal and thinking we were going to have to fund that again. (Campaigner 1, Reclaim These Streets).

Equally, one lawyer associated with the CARA claim detailed how, if clients' crowdfunding pages do not get sufficient interest from donors, this can lead to panic and anxiety that their case is not worthy or important – the damaging inverse of the legitimising and empowering effect some experience when gaining traction and donations. Where claimants need to promote deeply-felt issues on social media, an unreliable and variable mechanism, this direct interaction

[23] Hunter (n 12), 222-223, 226.

[24] Hunter (n 12), 222.

between justice and the market is ripe to heighten anxiety, both around whether a judicial review can proceed, and whether a case and its underpinning cause is perceived to have public support and social worth.

In view of the stresses of litigation, potentially compounded by the marketing endeavour of crowdfunding, case study participants widely expressed that experienced claimant lawyers and the staff at CrowdJustice itself were vital in communicating their understanding of crowdfunding's distinct requirements and cadences, and reassuring those new to its rhythms. CrowdJustice routinely provide specific guidance detailing, inter alia, the best times of the week to launch pages, the expected timeline of when donations are made over 30 days, strategies for securing donations, and how to effectively communicate cases to the public. An Up the Elephant campaigner outlined how CrowdJustice advised the following:

> have donors lined up … before the appeal goes live, so that you can really get off to a good start, because they say people give money if they see a successful appeal. If they don't see a successful appeal, they're less inclined to give money! Which is very unjust but that's the way it works … they were very precise about it, they said, if you can get them to do it within the first minute or the first five minutes, or the first hour (Campaigner 1, Up the Elephant).

Particularly important here, given the prior discussion of anxiety around a case being financially (un)able to proceed, is advice on the temporal rhythm of crowdfunding across a 30-day fundraising period, a rhythm which to an inexperienced eye might seem highly surprising and stressful indeed. In the Immigration Exemption claim, the campaigners – new to litigation crowdfunding – were reassured by CrowdJustice staff explaining that 1/3 of the funding target should be met within five days, with the next 20 days dedicated to another third, and the final five days spent achieving the final third, as donors will support claims that appear likely to meet their targets. Had this nonlinear fundraising timeline not been explained, the campaigners would have become desperate when, after a strong start, funding slumped in the middle. With a calm message from experts that this seemingly idiosyncratic experience was in fact typical, they were encouraged and heartened. The campaigners were also aided by the confidence of their lawyers in their ability to crowdfund and their familiarity operating in that funding structure, and affirmed that firms with such experience are key to civil society organisations proceeding with crowdfunded strategic litigation. The familiarity of key gatekeepers in facilitating effective and less emotionally burdensome use of crowdfunding thus demonstrates another site in which repeat player lawyers can help to mitigate the divide in intangible resource

facing less experienced actors.[25] Yet this also gives rise to a further observation as to the relative ease with which repeat players may experience crowdfunding.

Repeat player groups with experience and expertise in communicating litigation's process and outcomes to existing networks might be thought likely to fare more comfortably when encountering certain features of crowdfunding. While JCWI did experience difficulty raising funds for the right to rent claim, not least because of the unattractiveness of migrant and landlord matters in donation terms (about which more shortly), they did find the process of communicating to donors relatively simple. As a legal charity, they had accumulated ample experience over many years in litigating and framing communications around litigation, both to supporters and journalists, meaning there was less new learning to do or systems to implement around the outreach process. Indeed, the organisation has had a communications specialist skilled in "legal comms" and taking "legal technical stuff and mak[ing] it into something that the public can understand and care about" – a "skill of the job" learned through experience and "develop[ed] over time" (Campaigner 2, JCWI). In the Immigration Exemption claim, it was felt that the the3million and ORG's charitable experience meant the act of promotion itself was "not a particularly daunting task":

> if you've worked in the charitable sector, you're pretty familiar with what you need to say to encourage people to give money. And it's all part of the charitable objectives, it's not as though it's something frighteningly new … it's about pitching in such a way … the key thing was promo-ing it and getting media interest, and I think we had a few pieces in the Guardian and things like that which really helped in terms of amplifying it and encouraging traffic towards the page. (Campaigner 1, the3million/ORG)

This does not mean these repeat player groups are entirely without difficulty – the above account in the Immigration Exemption case of the worries and uncertainty associated with the unfamiliar crowdfunding timeline clearly demonstrates otherwise. But in comparison to those less familiar with the cadences of communicating around litigation and fundraising more generally, this surely represents something of a head-start in the crowdfunding process.

[25] See Chapter Two of the thesis, and Carol Harlow and Richard Rawlings, *Pressure Through Law* (Routledge 1992), 121.

The inequalities of crowdfunding

For such a resource-intensive and emotionally burdensome endeavour, one would hope the financial rewards are worth it. As Chapter Two has shown, this is often far from the case, with claims generally raising modest sums and facing uncertainty as to whether they can proceed. This sub-section explores the implications of those quantitative findings in qualitative depth, adding further context to the resource burden facing litigants: not only is the process time-intensive and stressful, it can also be highly unequal in distribution.

As Chapter One has indicated, there is a wealth of literature discussing the unfairness and inequalities of making access to justice dependent on finance, whether theoretical,[26] or responding to austerity policy – most notably, in England and Wales, LASPO.[27] We might regard crowdfunding as a very overt consequence of making justice depend on money,[28] following legal aid cuts, as Chapter Four discussed. In the case studies, fundraising inequalities are apparent in two core forms. First, inequality according to the popularity of issues and the profile of people involved, whether litigants, client groups, or donors; and second, possible inequality according to the approach that CrowdJustice itself takes to promoting claims.

Inequality according to issue popularity has been raised frequently as a theoretical concern around judicial review crowdfunding in the existing literature.[29] In the case studies, we see reports of this effect in practice, most starkly in the right to rent claim. Campaigners here reported that migration-related issues have, in their experience, rarely been attractive for crowdfunding, particularly in view of the large resource commitment it requires. This was intensified further still for the right to rent, where, in an unorthodox coalition of interests,[30] donors were asked to support both migrants and landlords. As one campaigner noted:

> crowdfunding from public support was very hard to come by, I mean ridiculously so … [given] the dual position of everyone hates landlords anyway, and also the level of

[26] Frederick Wilmot-Smith, *Equal Justice: Fair Legal Systems in an Unfair World* (Harvard University Press 2019).

[27] Ellie Palmer et al (eds), *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart Publishing 2016).

[28] Sam Guy, 'Access to justice on the market: An empirical case study on the dynamics of crowdfunding judicial reviews' [2021] PL 678, 685.

[29] ibid; Joe Tomlinson, 'Crowdfunding public interest judicial reviews: a risky new resource and the case for a practical ethics' [2019] PL 166, 179.

[30] Tola Amodu, 'A Coalition of the (Un)Willing? The Convergence of Landlord and Renter Interests in the "Right to Rent"' (2019) 11(2) JPPEL 121.

> public support for immigrants is pretty low in the UK … and that's been a problem for JCWI (Campaigner 1, Residential Landlords Association).

A core feature of promoting a crowdfunding page, numerous participants suggested, is highlighting individuals' stories to make the issue compelling and emotively illustrate the wider problem. Often, migrant rights challenges are structural, systemic, and abstract, reducing the capacity for such vignettes which enable prospective donors to connect with and relate to the plight of affected groups. In this way, some causes and types of challenge may be less suited to the distinct cadences of crowdfunding promotion.

The demographics of a client group are, then, reported to be influential in delimiting the scope for fundraising and, in turn, we might say, the degree of labour required of those seeking funding. Consider the Good Law Project (GLP), who some participants suggested could fundraise relatively easily to a middle-class base interested in governance challenges at the heart of politics, such as procurement challenges concerning 'pandemic sleaze', compared to smaller and marginalised communities. Jolyon Maugham detailed how, when the GLP takes claims affecting "fundamentally friendless" disadvantaged groups such as Gypsy, Roma, and Traveller communities, who are "quite strongly underrepresented online", even the GLP – by far the most experienced and high-profile repeat player crowdfunded litigant – struggle to crowdfund much money, instead relying on larger funding bodies to support those workstreams. By contrast, a campaigner in the Immigration Exemption case noted that, in the context of EU citizens' rights issues, such as the litigation around disenfranchisement in the 2019 European Parliament elections, the donor base was dominated by professional, middle-class white EU citizens:

> it's partly to do with things like class and race. It was literally a lot of outraged middle-class white people … their identity puts them in privileged position in terms of being able to act on it … black deaths in custody are kind of hovering at £10K and then EU citizens, professionals … it's very unequal … at the same time, I was exposed to things that didn't get so much traction on social media, or that didn't speak so much to people of a certain class (Campaigner 2, the3million/Open Rights Group).

This dimension of intersectionality adds to the discomfort around the inequality embedded in the "marketing" task – a task central to crowdfunding, and yet which arguably has populist characteristics and means fundraising success does not necessarily correlate with merit or genuine public interest.

Another potential inequality based on the profile of actor is the profile of the litigant themselves. Alongside 999 Call's judicial review, another crowdfunded claim challenging the Accountable Care Organisation policy was brought by high-profile claimants, including Professor Stephen Hawking.[31] This claim raised substantially more money than 999 Call's claim, attributed in part to the fact that "once Stephen Hawking came on board, that was a big push, so then the press became interested" (Campaigner 1, 999 Call), and to the deeper pockets of that claim's audience, which included doctors. To be clear, both campaigns had a good relationship – there was no competitive tension here. Professor Hawking "was a celebrity and everyone loved him quite rightly, and we were very pleased for them and we were so grateful that he used his position to say what he said about the NHS" (Campaigner 2, 999 Call). As such:

> they got their money really fast in a couple of days, and they had a much bigger ask than us, and we really, it was really slow … pushing up to the deadline to get it (Campaigner 2, 999 Call).

These reported inequalities – of popularity and demography – exemplify the risk that litigants bringing important issues are overlooked based on arbitrary factors unrelated to the demands of justice, meaning they might exert greater practical – and perhaps, relatedly, emotional – effort to achieve funding targets.

As Chapter Five noted, CrowdJustice is a key actor in the crowdfunding landscape whose role in shaping access to justice warrants further attention. An important, and as yet underappreciated, feature of this is their own mailing list, which I argue can operate a (not unproblematic) gatekeeping function for claimants seeking funding. As a CrowdJustice staff member explained:

> a major way that we can help and, obviously, unfortunately we can't do it for every campaign just because we wouldn't have space, [is that] we do have a mailing list of everybody that's donated that has opted in to hear from us about other campaigns, so we will send out emails to different groups on that list. Depending if you donated to a case about immigration we might send you another case on immigration … we usually send out about two or three emails a week to that list, and they can raise quite substantial money (Staff 1, CrowdJustice).

[31] *R (Hutchinson and ors) v Secretary of State for Health and Social Care and anor* [2018] EWHC 1698 (Admin).

All cases on the platform are "tagged", for instance as a conservation case, as Chapter Two detailed, enabling CrowdJustice to send cases "that we think people will want to hear about", by "pick[ing] ones that we have an audience for". Various participants across case studies testified to the value of this when used in their claims. For 999 Call:

> you can see the stats, actually that did bring – there's dedicated people who just like to support legal stuff, obviously, because actually on the days they sent their emails out, it did go up enormously (Campaigner 1, 999 Call).

Similarly, while the right to rent crowdfunding page was seemingly not on the mailing list, JCWI's judicial review regarding the EU Settlement Scheme was promoted through this channel:

> that is obviously worth a huge amount of money, so they obviously have built up this mailing list of people who care about using the law as a way of getting change and backing people. So they picked our campaign to share with their supporters and that obviously made a huge impact (Campaigner 2, JCWI).

On that crowdfunding page, which raised £20,145,[32] the split between donations from existing JCWI supporters and donations via CrowdJustice's mailing list was estimated at roughly "50/50". As this campaigner detailed, CrowdJustice "have their own strategy", wanting to "build an engaged audience" which in turn "really supports organisations like us" and fosters "a good partnership" with "overlap of our interests". The platform has "a sense of the issues that their followers are particularly interested in" (Campaigner 2, JCWI), and migrants' rights and social justice issues were felt to form part of this. So far, so positive.

Yet there is another dimension here. By all accounts, including those of CrowdJustice itself, being placed on CrowdJustice's mailing list can make a substantial difference in whether a case meets its funding targets. It was suggested that CrowdJustice "are interested in stuff that has national and wider public interest" and by contrast "wouldn't promote a case that was very specific or [had] … a one-person implication" (Campaigner 2, JCWI). The platform has limited capacity, and it is logical to promote cases likely to be of interest to those on the mailing list. It does, though, give rise to potential further inequality in the intensity of labour which claimants must endure to receive funding – if the mailing list can substantially affect fundraising capacity,

[32] The Joint Council for the Welfare of Immigrants, 'Help stop the Home Office criminalising EU citizens after Brexit' (CrowdJustice, 2020) <https://www.crowdjustice.com/case/dont-criminalise-vulnerable-eu-citizens/>.

those not placed on the mailing list must go to extra lengths than others to promote their claims. For JCWI, the right to rent claim, seemingly not shared by CrowdJustice,[33] raised around £7,500 across two fundraising pages, taking the claim to the Court of Appeal. Furthermore, if indeed the mailing list is tilted towards claims with national public interest dimensions, that may leave smaller cases facing comparatively greater burdens, and potentially without the internal resources to market as effectively.

Alongside Chapter Two's distinction between typical and outlying funding rates, the experiences reported in this chapter – of litigant stress and unease at the need to market a case, and of inequalities according to antecedent factors unrelated to merit or justice – indicate a significant shift in judicial review funding from the introduction of a market ideology. Those needing to crowdfund must, in effect, persuade two separate audiences as to their claim's legitimacy – prospective lay donors, and the court – often doing so by speaking in two considerably different cadences. It has been suggested that (medical) crowdfunding campaigns benefit from multiple literacies, including social media literacy, reflective of social capital.[34] Notwithstanding that many donors will donate to specific cases that attract their attention, rather than actively looking for claims to support, crowdfunding is ultimately a finite and competitive market – case owners must mobilise narratives to secure the crowd's interest.[35] Within medical crowdfunding, this has included leveraging discourses of vulnerability to secure care, and discourses positioning the case owner as a responsible, worthy, and deserving recipient of funds.[36] There can also be an emphasis on 'selling' stories to donors,[37] which resonates with participants' accounts, discussed above, that individual stories make strategic litigation issues compelling to a donor base. Indeed, CrowdJustice encourages the use of stories to make pages appealing. As briefly analysed in Chapter Two, it is hardly uncommon for

[33] It is unclear whether CrowdJustice's policy on mailing lists has changed since then (and prior to the later Settlement Scheme claim) – this option to share the right to rent claim may not have been feasible.

[34] Lauren S Berliner and Nora J Kenworthy, 'Producing a worthy illness: Personal crowdfunding amidst financial crisis' (2017) 187 Social Science & Medicine 233.

[35] Susan Wardell, 'To wish you well: the biopolitical subjectivities of medical crowdfunders during and after Aotearoa New Zealand's COVID-19 lockdown' (2023) 18 BioSocieties 52, 74.

[36] ibid; Trena M Paulus and Katherine R Roberts, 'Crowdfunding a "Real-life Superhero": The construction of worthy bodies in medical campaign narratives' (2018) 21 Discourse, Context & Media 64; Berliner and Kenworthy (n 34).

[37] Shonali Ayesha Banerjee, 'Digital philanthropy for the masses: crowdfunding platforms marketising NGO partnerships for individual giving in India' (2021) 31(7) Development in Practice 896, 902-903.

litigation crowdfunding appeals to employ frames articulating their case's place within broader efforts for accountability and democracy. In this vein, some lawyers interviewed were concerned that crowdfunding might contribute to a politicisation of judicial review, wherein, given the competition for funds and concomitant need to persuade a broad donor base, campaigns frame their legal disputes within wider political campaigns. This discursive strategy may apply when demonstrate to an existing social network that this cause is worthy of their funds in amongst the other financial demands they face, or communicating to a mailing list that this case is worth funding over and above the other cases they also receive information about.

In these ways, crowdfunding complicates the decision of whose justice to fund, bringing market rationalities and overt competition to the fore. Of course, anyone bringing a judicial review will have to convince another party of their claim's legitimacy: when applying for legal aid, the claimant and their lawyers must persuade the Legal Aid Agency that the claim has merit and thus deserves funding. Meanwhile, as Chapter Four indicated, when a civil society organisation chooses to litigate, it must navigate a whole host of internal questions concerning legal, financial, and reputational risk. That said, the character of the persuasion in crowdfunding is substantively different – the audience which a claimant must persuade does not make funding decisions so clearly based on legal merit or advice. Indeed, sometimes they will not even know the claim's legal basis. Rather, as Ren et al's research indicates, crowdfunding success is associated with factors such as using affective language in funding appeals, an association intensified in public interest cases.[38] That affect and salience might influence fundraising prospects is at once both unsurprising and deeply concerning, indicating a need to draw on logics of deservingness and worthiness, at least implicitly, to optimise success. The market rationalities at play – that individual consumers' decentralised preferences efficiently manifest themselves on the market –[39] sit uneasily with questions of merit, public interest, and justice. Though other forms of crowdfunding may differ here, the crowd's wisdom, voice, and preferences are not necessarily associated with what is right to fund, given the matter

[38] Jie Ren, Viju Raghupathi and Wullianallur Raghupathi, 'Exploring the Factors that Determine the Success of Litigation Crowdfunding: Implications for Social Justice' (2021) 169 Technological Forecasting & Social Change 120813; Viju Raghupathi, Jie Ren and Wullianallur Raghupathi, 'Understanding the nature and dimensions of litigation crowdfunding: A visual analytics approach' (2021) 16(4) PLoS ONE.

[39] Juan J Rivero, 'Planning iconic Coney Island: an encounter in planning rationalities' (2017) 38(2) Urban Geography 177, 179-180.

of legal merit, potentially poorly grasped by a lay crowd deficient in understandings of civil and administrative law – Chapter Eight discusses this further.

Conclusion

In a keynote speech delivered to the 2021 Public Law Project Conference, then-Attorney-General Suella Braverman KC MP had much to say regarding the use of judicial review for political aims. This included the following:

> it is vital that judicial review does not become the vehicle of choice for failed political campaigners … litigation must not be the continuation of politics by other means. The taxpayer frequently ends up footing the bill, especially now that campaigning organisations use crowd-funded litigation to achieve political aims. To acquiesce in the face of such activity undermines the Rule of Law, and creates endless uncertainty as to what the law is.[40]

This chapter has drawn attention to a feature of the judicial review process often obscured by the thrust of popular discourse on the subject: the considerable resource sink of litigating, and indeed in doing so using crowdfunding. These experiences, ranging across case study participants, provide an important challenge to the implications in common narratives from central government that frame judicial review as increasingly used for political causes by interest groups.[41] Namely, the impression that litigation is easily and spuriously brought, and that crowdfunding represents a particularly straightforward and easy mechanism by which to access judicial review to challenge policy, having failed in the political realm.

The accounts reported in this chapter indicate that the judicial review process can bring with it considerable stress for individuals and organisations – in the context, it must be

[40] The Rt Hon Suella Braverman KC MP, 'Judicial Review Trends and Forecasts 2021: Accountability and the Constitution' (Public Law Project Conference, London, 19 October 2021) <https://www.gov.uk/government/speeches/judicial-review-trends-and-forecasts-2021-accountability-and-the-constitution>.

[41] *Independent Review of Administrative Law* (Ministry of Justice) <https://www.gov.uk/government/groups/independent-review-of-administrative-law>; Chris Grayling, 'The judicial review system is not a promotional tool for countless Left-wing campaigners' *Daily Mail* (London, 11 September 2013) <https://www.dailymail.co.uk/news/article-2413135/CHRIS-GRAYLING-Judicial-review-promotional-tool-Left-wing-campaigners.html>.

emphasised, of justiciable problems which are deeply-felt by the claimant. In particular, tactics of defendants may be experienced as adversarial, while the volumes of paperwork can be overwhelming, and the costs risk stressful – perhaps especially so for less experienced claimants lacking the cultural resource of confidence and knowledge to navigate this. It might be thought that crowdfunding would alleviate some of these issues, not least the stress associated with the costs risk. Certainly, crowdfunding is transformative for litigants lacking resource. Yet, as this chapter has reported, it can itself also present resource challenges to claimants. It can require dedicated time designing and marketing a fundraising campaign, which may be all-encompassing and effectively represent a 'second full time job', and may need organisations to divert resources from other workstreams. Meanwhile, the precarity of fundraising, and the potentially unexpected and counterintuitive timeline, can heighten stress, particularly for the inexperienced litigant. These resource drains should be viewed alongside crowdfunding's unequal prospects for different claimants and causes – for many, it is not a process pursued to conclusion without consideration and perseverance.

Perhaps the most striking source of litigant stress present in participants' accounts is the need for claimants to market their causes to convince prospective donors, seen as an awkward and uncomfortable necessity. This unease is entirely understandable, considering the underlying claim's importance to litigants, who must now promote their cause as worthy of an audience's support. This is worth pausing on. The thesis has pushed back against some criticisms of crowdfunding, suggesting they lack proportion in view of the crowdfunding landscape as a whole beyond the outlying cases. Yet, here, the crowdfunding model encourages an unwelcome shift. The logic of promotion sits uncomfortably with the values embedded in equal access to justice such that meritorious cases can be heard, and such market rationalities might potentially influence understandings of deservingness in judicial review funding if use of crowdfunding grows apace. Of course, for reasons discussed earlier in the thesis, claimants themselves have little choice but to engage in this uncomfortable process. Academics and practitioners, though, should continue to recognise and problematise the embedded market logic, even while acknowledging crowdfunding represents an important, but second-best, necessity for claimants at present. As with this account of crowdfunding's market rationality, Chapter Seven details another form of potential contrast and tension between the logics of crowdfunding and the judicial review system – their divergent temporalities.

Chapter Seven: The Temporal Ordering of Public Law

Introduction

It is by now well-understood that the temporal dimensions of legal processes constrict and shape social action. A growing socio-legal scholarship addresses law's particular construction of time, and its 'temporalising force',[1] which affects and constructs wider social practices. Scholars have examined time limits,[2] but also other time-related legal technicalities,[3] and the wider temporal dynamics of law and litigation.[4] This chapter discusses the rhythm of the judicial review procedure, interrogating its relationship to the temporally distinct process of crowdfunding. It argues that judicial review shapes claimants' social action into strictly defined periods, affecting the character of their legal mobilisation, and crowdfunding, processes. Claimants do have capacity to use judicial review's strict timeline to galvanise communication around the progress of their claims. They are also, though, constrained and ordered by case management processes, which can complicate the strategy of managing a crowdfunding appeal. This represents another way in which crowdfunding, and mobilisation of judicial review, is closely regimented by the judicial system.

Of course, not all issues discussed here are unique to crowdfunding – the matter of legal and political temporalities coming into conflict when mobilising law will be far more commonplace. For instance, the chapter discusses delays and quickening of judicial review claims, as a further indication of the power held by the judiciary and state in relation to claimants – delay and quickening are certainly not unique to crowdfunded claims. However, there are, it is argued, temporalities associated with crowdfunding which heighten the contrast with legal timelines. Indeed, the temporalities of crowdfunding are argued to be at times

[1] Sinéad Ring, 'On delay and duration: Law's temporal orders in historical child sexual abuse cases' in Siân M Beynon-Jones and Emily Grabham (eds), *Law and Time* (Routledge 2019), 96.

[2] Zoltán Pozsár-Szentmiklósy and Yaniv Roznai, 'The Timing of Judicial Review of Constitutional Amendments – Towards a 'Time Sensitivity Test' Following the Moldovan Constitutional Court's Decision on the Modality of Electing the President' in Sofia Ranchordás and Yaniv Roznai (eds), *Time, Law, and Change: An Interdisciplinary Study* (Hart Publishing 2020).

[3] Emily Grabham, 'Time and technique: the legal lives of the 26-week qualifying period' (2016) 45(3-4) Economy and Society 379.

[4] Carol J Greenhouse, 'Just in Time: Temporality and the Cultural Legitimation of Law' (1989) 98 Yale L J 1631; Chris Hilson, 'Framing Time in Climate Change Litigation' (2019) 9(3) Oñati Socio-legal Series 361.

contingent on external factors such as contemporaneous political salience, strengthening concerns that (un)successful fundraising can be somewhat arbitrary.

Temporalities are, then, the chapter argues, another expression of the power imbalance facing claimants when encountering judicial review's structure and dynamics. This might not necessarily be problematic – many would argue the litigation process ought to disrupt attempts to pursue broader social goals. Yet these findings should help to problematise a notion that crowdfunded litigants have free reign to pursue such an agenda in court – judicial review's procedural design constraints tightly structure their action and emblematise the power imbalance claimants experience, both with the courts and, as key designer and repeat litigant in the system, the executive.[5]

The temporalities of pre-action procedure and crowdfunding

Case-management tensions

A range of case management features structure the judicial review process, designed to regulate a rising caseload and optimise administrative aims of efficient system-management,[6] arguably within a re-emergent proceduralist approach to resolving disputes economically.[7] The modern judicial review procedure's development from 1977 sought to improve caseload efficiency and speed and to reduce delays,[8] amid limited judicial resources –[9] especially through the requirement of leave.[10] The pre-action procedure which has subsequently developed is replete

[5] Joe Tomlinson and Alison Pickup, 'Reforming Judicial Review Costs Rules in an Age of Austerity' in Andrew Higgins (ed), *The Civil Procedure Rules at 20* (OUP 2020), 205.

[6] Robert Thomas, 'Immigration Judicial Reviews: Resources, Caseload, and 'System-manageability efficiency'' (2016) 21(3) JR 209.

[7] Joe McIntyre and Lorne Neudorf, 'Judicial review reform: avoiding effective review through procedural means?' (2016) 16(1) OUCLJ 65.

[8] Michael Fordham KC et al, *Streamlining Judicial Review in a Manner Consistent with the Rule of Law* (Bingham Centre Report 2014/01, Bingham Centre for the Rule of Law 2014), 4.

[9] *R v Panel on Takeovers and Mergers, ex p Guinness plc* [1990] QB 146; [1989] 1 All ER 509, Lord Donaldson MR at [177-178]; Maurice Sunkin, 'What Is Happening to Applications for Judicial Review?' (1987) 50(4) MLR 432, 460.

[10] AP Le Sueur and Maurice Sunkin, 'Applications for judicial review: the requirement of leave' [1992] PL 102, 104-105.

with incentives for early resolution, particularly since the post-Bowman Report reforms,[11] which followed Lord Woolf's access to justice programme.[12] Embedded in much pre-action case management procedure, then, is a temporal dimension focused on speedy efficiency. Law and legal process is not temporally passive, but rather produces and structures time through strict temporal ordering processes.[13] Claimants must navigate this when launching a crowdfunding page. As Arrington notes, the litigation process is far more structured than forms of sustained activism in the political realm, meaning researchers must recognise the relatively stable (albeit not static) institutional rules and processes which structure actors' claims-making.[14] The most self-evidently temporal ordering process in judicial review is the time limits for issuing a claim, and the tight deadlines at each stage of the process once the claim is issued. The time limit to issue is ordinarily three months (alongside being issued promptly),[15] and six weeks in planning and environmental cases –[16] a large proportion of crowdfunded claims. As participating lawyers reported, these tight limits give communities little time to set up and competently develop and establish a crowdfunding page, and raise enough money to adequately cover potential early costs, possibly meaning some cases struggle to proceed. This supplements claims that the tight proceduralism of the narrow time limits risks restricting 'accessible and effective judicial review',[17] and it of course presents another dimension of labour and stress for claimants. It is difficult to fundraise for a case that has not yet been issued: asking donors to fund a case that might be brought next month is hardly appealing, and ethically, a claimant might not yet know, and be able to publicly communicate, what the case is about, giving rise to the potential for misrepresenting. Equally though, it is incredibly risky, given the strict timescales, to launch after issuing and seek donors' money by the end of the week or else a case cannot proceed.

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[11] *Review of the Crown Office List* (Lord Chancellor's Department 2000). See Tom Cornford and Maurice Sunkin, 'The Bowman Report, access and the recent reforms of the judicial review procedure' [2001] PL 4; Varda Bondy and Maurice Sunkin, 'Settlement in judicial review proceedings' [2009] PL 237.

[12] Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales* (HMSO 1996).

[13] Carol J Greenhouse, *A Moment's Notice: Time Politics Across Cultures* (Cornell University Press 1996).

[14] Celeste L Arrington, 'Hiding in Plain Sight: Pseudonymity and Participation in Legal Mobilization' (2019) 52(2) Comp.Pol.Stud. 310, 317.

[15] CPR 54.5.1.

[16] CPR 54.5.5.

[17] McIntyre and Neudorf (n 7), 98.

Considerations of timing and crowdfunding can also arise when seeking legal aid. It was reported that, whereas legal aid would previously cover a full claim, recent years have seen it applied only partway through the case, with hours worked beforehand going unpaid. Crowdfunding can thus provide useful early-stage funding countering this squeeze on lawyers. Similarly, Legal Aid Agency decisions on whether to grant legal aid can, it was noted, be very slow indeed, and decision-making delays might see a claimant unable to meet the litigation time limits. In such instances, a claimant could file the judicial review application and stay it – which a court might be uncomfortable with or impatient towards – or miss the deadline due to appealing the Agency decision, and hope that if legal aid is granted following the appeal, the court will allow a late claim given those funding problems. Amid such uncertain delay, crowdfunding can at least offer some claimants a "stopgap" while awaiting a decision. Similarly, some participants observed that the landscape for institutional funding of strategic litigation can be slow in decision-making, and sometimes uses seasonal windows for funding, meaning the calendar may not be right for a funder to support litigation. In a fast-moving claim, crowdfunding can thus provide a more flexible and rapid response where claims have high visibility. It was regarded as important, however, that crowdfunding does not entirely substitute rapid-response institutional litigation funding, given not all civil society litigation activity will "cut through" as a popular crowdfunding appeal.

The different temporal cadences of crowdfunding and pre-action procedure can complicate a crowdfunding strategy. As Chapter Four discussed, costs-capping is decided at the permission stage, rather than earlier in the process. Costs incurred before permission, then, arise prior to knowing whether, and at what limit, the other side's costs will be capped. One campaigner in the right to rent claim detailed:

> it's also difficult to stack [crowdfunding] together with the timelines that you're often operating on. JR has tight timelines. So it's difficult to get started … you need your money really early in the process and that can be quite difficult. … one of the problems with JR particularly, is you probably have to assume you're going to self-fund your permission application, your paper one. If you get permission, wow it's much easier. And I think you need to do several rounds of crowdfunding … Getting your permission application through makes it a lot easier to get more money. (Campaigner 1, Residential Landlords Association)

Depending on the costs arrangement with their own lawyers, a claimant might need £5,000 for their lawyers' initial advice, often set as a first target on crowdfunding pages; they may then

need £5,000 to send the pre-action protocol, and £5,000 up to the point of seeking permission. Claims requiring time-intensive factual investigations or expert reports may have further upfront costs. This will all be self-funded. Meanwhile, some risk remains concerning what costs defendants have incurred as far as permission, in case permission is refused and the defendant seeks their costs – albeit only for the acknowledgment of service, per *Mount Cook*.[18] In effect, a claimant will want to know they "can cushion against the cost of [their] opponent" for the acknowledgment of service, by fundraising the "quasi-fixed amount" the other side can recover from a claimant who is refused permission (Campaigner 1, the3million/ORG). It appears relatively common practice, therefore, to crowdfund at an early stage to cover costs up to permission – claimant-side costs investigating whether there is a claim and issuing, and the cost of the other party's (or parties') acknowledgment of service. Then, at a time close to the permission stage, or once a costs-cap is decided at permission, they fundraise more significantly to meet the level of the costs-cap. The exact strategy depends, of course, to some extent on each case's particular considerations. Where a case is labour-intensive to put together, and merit is initially unclear, a claimant may be advised not to fundraise significant amounts until it later becomes clear there is a strong argument – then, more urgent crowdfunding may commence.

Given the importance of covering early costs, and of adequately representing a case's details to donors, participants agreed that the most appropriate time to launch a crowdfunding page tends to be just before, or around, issuing proceedings. A claimant can then cover their costs up to permission, and once granted permission can fundraise for the full hearing (unless, of course, they settle satisfactorily out-of-court, which a grant of permission may incentivise). Money thus needs to be raised in stages as the case proceeds. CrowdJustice's system of 'targets' and 'stretch targets' enables this – if a claim does not meet its initial target, often around £5,000 to cover early costs, the money is not kept. If the case continues beyond its initial investigative stages, the claimant can set a stretch target for further funds, keeping any funds raised above the initial target. This feature is important for ethical conduct – large funds should not be sought at an early stage when it is unclear whether the case will proceed. Yet there are some uneasy, and sometimes perverse, temporal dimensions to this interaction of crowdfunding and the pre-action timeline. It was widely reported that, except for a claim that later receives new political

[18] *R (Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346, [2004] CP Rep 12.

salience, most claimants fundraise much of their money in the "first hit", with diminishing returns from later repeating requests – except perhaps for an appeal. As one lawyer detailed:

> the timing is quite important, because from our experience the biggest chunk of the money is fundraised right at the outset, so the first time that a page is publicised and in the first few weeks after, because people are most interested. And so I think timing the launch of the page with a key moment in the legal case often works quite effectively, so that might be, depending on the client, at the stage of sending the first legal letter, or it might be when we know for sure that we're going to be bringing the case, in which case we wait until we've filed the papers at court, and then combine launching the crowdfunding page with any press that we send out. And also, the advice we often give is that whoever's in charge of fundraising is transparent with supporters about what the money is used for because, particularly if they fundraise for initial advice work … and the advice might be not to pursue the legal case. In which case … [they must] be clear with their supporters that they're doing this on a conditional basis and it doesn't necessarily mean that there'll be a legal case at the end … that's another key thing, managing expectations. (Lawyer 2, 999 Call/JCWI)

While staggering the fundraising appeal is important and common, there may remain perverse economic incentives to raise larger amounts early and avoid the risk that later fundraising requests are less effective. For outlying popular cases, this may result in claims being refused permission – a minority of crowdfunded claims, as Chapter Two reflects – but raising more than necessary given the stage of litigation the claim ultimately reached. Equally, claimants who cannot afford to self-fund initial legal advice may launch crowdfunding before having much idea of the claim's prospects. This may be relatively unproblematic where a small amount is raised to cover initial costs, around £5,000, but some weak cases might attract larger reserves. Perhaps the wisest approach is to fundraise across separate pages at different stages of litigation – 999 Call for the NHS used five pages, funding each stage among a grassroots donor base of limited means. For the3million, in their 2019 European Parliament election litigation, their initial crowdfunding page prior to permission was incredibly popular – the organisation thus ceased fundraising because, as they detailed on a second crowdfunding page, 'we felt it would

be unethical to take people's money until we were certain we had a viable case'.[19] When they needed to restart fundraising having been granted permission, they needed to launch new pages – while opening new pages at each stage may have benefits, restarting the page rather than being able to edit and reuse the original page was also regarded as an intensive time sink. There are, therefore, strategic temporal considerations to manage alongside ethical and procedural demands, as the following sub-section explores.

Strategic uses of a linear timeline

Timing is critical to the matrix of legal, ethical, and political factors influencing strategy when mobilising law via crowdfunding. Various temporalities produce and materially shape socio-political action and relations,[20] including the temporalities of law and legal proceedings,[21] through temporal ordering processes. In crowdfunded litigation, we see judicial review's strict and linear temporal ordering process, in its streamlined pre-trial procedure, encountering the different temporal ordering of campaigning and crowdfunding strategies. Again, this reinforces the challenges of crowdfunded legal mobilisation, when strategies for effective fundraising, and thus access to judicial review, may be frustrated by what judicial review's narrow proceduralism allows. As participants detailed, there are logical points, strategically and politically, to launch a crowdfunding appeal – there may thus be "back-and-forth" discussion between the legal team and claimant group to potentially account for this while aligning with the pre-trial process and ethical expectations. There are, as discussed, ethical demands not to raise too much money too early and to avoid over-promising when a claim's prospects are being explored. Alongside these demands, organisations' strategic considerations around timing a launch may include, for instance, claimants establishing themselves as key actors in the legal challenge, gaining momentum, or achieving publicity. For the3million and Open Rights Group, the first of these considerations was especially relevant in deliberating when to launch a claim. Both organisations had challenged the Immigration Exemption while the Data Protection Bill progressed through Parliament, working with MPs to attempt to introduce into the Bill a

[19] the3million, '#DeniedMyVote was unlawful – help the3million challenge the Government' (CrowdJustice 2019) <https://www.crowdjustice.com/case/denied/>. All webpages in this chapter last accessed 11 September 2023 unless otherwise stated.

[20] Thomas Poell, 'Social media, temporality, and the legitimacy of protest' (2020) 19(5-6) Social Movement Studies 609, 612.

[21] Philip Ashton, 'Time-spaces of adjudication in the U.S. subprime mortgage crisis' in Siân M Beynon-Jones and Emily Grabham (eds), *Law and Time* (Routledge 2019), 77.

favourable amendment. During the Bill stage, but once it became clear that the amendment and political action would be unsuccessful and the Exemption would remain, the organisations sent a pre-action letter to the government stating that if the Exemption became law, they would seek a judicial review, as is standard in strategic challenges to legislation, and launched an initial crowdfunding page. This also positioned the organisations as the lead groups in a relatively crowded field of potential litigators, ensuring they could take their form of argument forward. They did ensure, though, not to launch their claim or crowdfunding page at a time when parliamentary debates were ongoing and amendments were to be tabled in the Bill period, regarded as overly pre-emptive. Accordingly, temporal space remained between the campaign's distinct political and legal times, that is, the initial attempts to remove the Exemption from the Bill and, once it became apparent the Act would include the Exemption, the turn to litigation, to be commenced once the Exemption became law. This demonstrates one alternative strategic consideration when timing a crowdfunding campaign. The challenges here, with expectations (rightly) to proceed ethically, must be navigated by claimants who already adopt the uncertainty of a narrow fundraising window and risky and burdensome costs environment.

A crowdfunding campaign's temporal strategy might also need to account for publicity. To speak in language of publicity risks alienating some readers, for whom crowdfunding represents an unwelcome intrusion of politics into litigation. It is, though, a practical reality of access to justice at present that if crowdfunded claimants hope to succeed in bringing justiciable issues to court, they will need publicity. While judicial review's temporal ordering procedures have been argued to – quite reasonably – constrain the strategy of using crowdfunding, this linear procedure does also offer useful junctures for campaigners to galvanise publicity if handled strategically. A campaigner in the right to rent claim explained this:

> you can obtain your permission application, but then actually just walk away from the thing if you don't get your next round of money. And of course, if you get a permission application in JR, a lot of the press will just report it … and that in itself can be actually quite valuable to get permission and then just dump the whole thing, because you've already probably put enough pressure on for the other side to say 'yeah ok'. Because most JRs settle. (Campaigner 1, RLA)

They continued:

> you get multiple tilts [in a JR], and each one is divorced from all the others. You can do your initial pre-action letter, and the press will often report a pre-action letter … and

> you might get some money for that. You might get a bit of money to do a permission application and the press reports it … which is quite nice with crowdfunding in some ways, you can have multiple goes at the wheel.

A lawyer echoed these observations:

> the way these judicial reviews work, there's naturally quite good moments of publicity, so sending the first letter gets a bit of interest, launching the case gets more interest, if you get permission then that's another flashpoint, and then if you have a court hearing, it's quite a good process that if done well, I think people supporting feel like they're quite involved in the outcome. (Lawyer 2, 999 Call/JCWI)

Organisations must operate within judicial review's linear timeline, but can also use agency to recognise the process' defined stages as a means of optimising their media coverage, which facilitates crowdfunding. It is precisely the linearity and narrowness of judicial review's temporal ordering that can be used to galvanise attention – the communicable "concrete tangible wins or losses", such as getting permission, which "people are prepared to get behind" (Lawyer 2, Up the Elephant).

This sub-section has explored some interactions between the distinct temporal rhythms of crowdfunding and the pre-action procedure. The narrow litigation timeline can often restrict a crowdfunding strategy, although it can also give opportunities to galvanise support precisely because of its linear structure. The next section discusses the external temporal dimensions that can also influence crowdfunding strategies and their success.

Crowdfunding's contingent temporalities and political 'hotness'

The chapter has thus far emphasised the strategic and procedural difficulties which organisations face when coming to judicial review using a crowdfunding strategy. This section argues that success in fundraising can be affected by, and contingent upon, temporalities external to the case itself, most clearly the timing of politics. The potential for unpredictable socio-political timing to affect a crowdfunding appeal's traction could be used to evidence that crowdfunding introduces into the courtroom overtly politically-motivated litigation and is anathema to public law. It is healthy and right to be wary of the encroachment of politics into legal venues. Equally though, judicial review claims of executive action inevitably take place against a contentious backdrop, making a clear distinction between the legal and political less feasible. Another framing of crowdfunding's potential fundraising volatility is, at risk of

repeating myself, to focus on the scarcity in the access to justice landscape which has led to such an unstable form of justice funding, sometimes influenced by arbitrary external temporalities, achieving prominence when it is hardly a panacea. To return to Andersen's metaphor referenced throughout the thesis, this again demonstrates that legal mobilisation is akin to a match – when struck, a range of factors influence whether the litigation and its impact fizzles out or catches fire.[22] This sub-section demonstrates that these factors can include external contingencies.

The role of political salience is starkly demonstrated by Reclaim These Streets' differing fundraising experiences throughout the litigation. When fundraising for the urgent interim relief hearing in March 2021,[23] the claimants sought £30,000 and raised £37,000 in under an hour,[24] stopping fundraising immediately. This was because, at the time, the police's approach to facilitating the vigil following Sarah Everard's murder was the nation's main news story. While that crowdfunding effort was hugely successful, fundraising for the ultimate judicial review claim challenging (more retrospectively) the police's handling of the vigil was far from straightforward. As detailed in Chapter Six, the fundraising process was experienced as "hell" from May 2021 onwards, proving very difficult to gain donations. The claim, it was felt, was out of the public eye. The ask was also more complicated: they sought a retrospective finding that the Metropolitan Police had acted unlawfully, when the issue was already widely-regarded as politically disastrous for the police. As a campaigner detailed:

> [l]ots of people helped us share it, but it stopped being sexy because it just was academic. So in the time period in May, when we were actually trying to raise and it was so painful, it was because no one cared anymore, it was off the front pages, it didn't really matter (Campaigner 1, Reclaim These Streets, RTS).

That is, "until 'partygate' happened" in December 2021 and January 2022. 'Partygate' saw then-Prime Minister Boris Johnson, among others, revealed over multiple leaked emails and video recordings to have participated in 'boozy lockdown-breaking parties in Downing

[22] Ellen Ann Andersen, *Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation* (University of Michigan Press 2004), 218.

[23] *Leigh and ors v Commissioner of the Police of the Metropolis and anor* [2021] EWHC 661 (Admin).

[24] Jessica Leigh, 'Help us to Reclaim These Streets!' (CrowdJustice 2021) <https://www.crowdjustice.com/case/reclaimthesestreets/>.

Street'.[25] The Metropolitan Police's response to this was heavily criticised. For Reclaim These Streets, "the fact that 'partygate' happened in January right as our case was coming to the High Court meant it blew up." As such, fundraising for the full judicial review claim, which had been slow since May 2021, increased "from £27,000 to £45,000" (Campaigner 1, RTS). The claimants:

> got so much publicity around our case in January because [of] … the public's anger around 'partygate', just as we were in court. So it was very much the double standard … this is what you threatened us with, while they were bringing in suitcases of wine … it made our court case end up as front-page news, it stopped being academic because everybody was furious again. (Campaigner 1, RTS)

The claim thus "became really relevant again" given the fresh political context and perceived double standard in the police's responses to 'partygate' and the vigil. The success of crowdfunding, and the attention on the case, was:

> so much about the temperature check of what the public was interested in and what the media was hungry for, and once the media was cottoned back on to it, then we got a ton of attention again (Campaigner 1, Reclaim These Streets).

Similarly, crowdfunding for the3million and ORG was also reported to have received a boost given political salience. The Windrush saga occurred after the groups launched their Immigration Exemption claim, influencing their decisions around framing the Exemption in the crowdfunding appeal.[26] For instance, the page stated:

> This exemption effectively removes individuals' right to data protection if it's likely to prejudice "effective immigration control". That means it applies to all immigration cases including those affected by the Windrush scandal, the three million EU citizens living in the UK … and those seeking refuge in the UK, for example from Syria.[27]

The timing of the Windrush scandal provided the campaign a clear, effective, and appropriate message to help convey the effects of mishandling data and the issue's importance, meaning

[25] 'Partygate: Timeline of a national scandal that's still not over' *ITV News* (London, 12 January 2023) <https://www.itv.com/news/2023-01-11/partygate-timeline-of-a-national-scandal>.

[26] For discussion of the Windrush scandal, see Amelia Gentleman, *The Windrush Betrayal: Exposing the Hostile Environment* (Faber & Faber 2019).

[27] the3million, 'Remove the immigration exemption from the Data Protection Bill' (CrowdJustice, 2018) <https://www.crowdjustice.com/case/immigrationexemption/>.

that, when fundraising, the campaigners emphasised not letting Windrush happen again. The political climate of the late-2010s and early-2020s in the UK, it would be fair to say, has been volatile. Not least among the tensions has been the Brexit process, 'a pathological combination of chaos, gridlock, constantly unravelling negotiations, serial failures to find a way forward, and intensely adversarial intra- and inter-party divisions'.[28] The 2019 European Parliament election saw what was regarded as mass disenfranchisement of UK-based EU citizens, resulting in crowdfunded litigation by the3million. As Chapter Six discussed, this crowdfunding raised lots of money, attributed partly to the "very hot period" temporally in the EU campaigning space (Campaigner 2, the3million/ORG), which led to ample support and promotion for the case from EU and democracy campaign groups at a time of political dissatisfaction with the wider Brexit process alongside the disenfranchisement. Yet just as the crowdfunding bid in 2019's fraught climate was temporally hot according to socio-political time, the (unsuccessful) judicial review itself was ultimately received as temporally cold per law's time. The UK had left the EU one year prior to the claim being heard in the High Court in January 2021, meaning the Members of the European Parliament elected in 2019 had ceased to be MEPs. Lewis LJ thus regarded some of the claim's issues as 'academic and historic only',[29] such that even if the grounds had been made out, he would have refused declaratory relief.[30] This instability, wherein an initially politically salient claim is legally academic by the time it reaches court, emphasises the disconnect between social time and law's time, heightened by the slowness and delays with which a claim is ultimately heard. Again, this highlights legal mobilisation's unpredictable match-like quality – in a claim that initially seemed to catch fire amid a high-intensity political climate, the fast-moving situation changed again in the time taken to reach court.

This section has highlighted how socio-political externalities, when coinciding temporally with fundraising, might affect crowdfunding strategies. In this way, we see in some cases another potential inequality in crowdfunding – in effect, some campaigns may gain a fundraising boost due to convenient salience. Yet this politically 'hot' time can pass just as quickly as it arrives, indicating again the instability of crowdfunding for delivering access to

[28] Allan McConnell and Simon Tormey, 'Explanations for the Brexit policy fiasco: near-impossible challenge, leadership failure or Westminster pathology?' (2020) 27(5) JEPP 685, 686.

[29] *R (the3million Ltd and ors) v Minister for the Cabinet Office* [2021] EWHC 245 (Admin), Lewis LJ at [136].

[30] On academic claims, see Alex Shattock, 'The A Word: Academic Appeals in Public Law Challenges' (2019) 24(4) JR 327.

justice. The following section explores delayed and quickened hearings, arguing they reinforce power imbalances facing claimants using judicial review.

Legal quickening and delay

This chapter has drawn attention to the contrasting temporalities of campaigning around a crowdfunding appeal, and the judicial review process' less flexible timeline. Claimants' crowdfunding strategies are thus regulated and potentially disrupted by judicial review's prevailing temporal institutional architecture, arguably representative of the underlying dynamics of power. Put simply, through procedural rules and judicial discretion, the justice system controls the timeline more so than claimants can, and is no "nebulous blob" prone to manipulation. This relative temporal powerlessness of claimants becomes clear in claims' quickening and delay. Studying French asylum appeals, Hambly and Gill argue that speed and temporality take centre stage in administrative justice given high-volume caseloads and the pressing decision-making role of facilitating or disrupting state action.[31] This can of course result in delays and a lack of timeliness, which mean successful claimants must wait for relief, and which can create uncertainty and cost for decision-makers and those developing major public projects.[32] An Up the Elephant campaigner detailed how the delay in litigating up to the Court of Appeal dampened some of the case's extra-legal sting:

> these things take so much time, it took us about three years and, of course, we had the delays of Covid. And our appeal case was actually online, and … it loses a little bit of its urgency … it was still important, but time does its work, I think, in these situations, and that was unfortunate from our point of view. (Campaigner 1, Up the Elephant)

There is more to this than delay, though. Caseload pressures clearly influence adjudication.[33] Where resources and time are scarce, and there is perceived administrative pressure for quick and cheap adjudication, tension may arise between 'legal pace' and administrative efficiency, and guarantees of fair process and due consideration.[34] In this way, speed, in opposition to other

[31] Jessica Hambly and Nick Gill, 'Law and Speed: Asylum Appeals and the Techniques and Consequences of Legal Quickening' (2020) 47(1) J.L.Soc'y 3, 28.

[32] Fordham et al (n 8), 4; Catherine Haddon, Raphael Hogarth and Alex Nice, *Judicial review and policy making: The role of legal advice in government* (Institute for Government 2021), 10.

[33] Thomas (n 6); Bert I Huang, 'Lightened Scrutiny' (2011) 124 Harv.L.Rev. 1109.

[34] Hambly and Gill (n 31) 5, 28.

values,[35] may play a key ordering role controlling and constituting the process, potentially encroaching on decision-making quality.[36]

For 999 Call, campaigners expressed surprise that their hearing in the Court of Appeal, listed for two days, was concluded early. As explained on the crowdfunding page:

> We were all surprised by the judges' announcement, at 4.40pm, that they would be reserving judgement … [meaning] we would not get our expected second day in court … Initial surprise at the prospect of no 2nd morning of questions and investigation led to genuine puzzlement but a sense of optimism – we don't know what the judges are thinking, so we should not try to 2nd guess. Although not the ending we anticipated, we just have to wait for their judgement which may not be until after Christmas.[37]

The campaigners found this disappointing and "felt they could have at least given us the allotted time":

> there were lots of things in the bundle that we felt that were gone through too quickly … because we wouldn't be here if we didn't have an arguable case … because you can't just rock up to the Royal Courts of Justice and go 'I think this is wrong'. There's a long, long, long, tedious process, and it has to be arguable, so let's argue it. (Campaigner 4, 999 Call)

> it was frustrating, and I was really angry at the time … it came to four o'clock and we were expecting to say 'see you tomorrow at 9.30' and instead we got 'we'll defer our judgment' … we were so stunned … what do you do, you can't, well you could protest but then that would turn the judges against you and you're trapped in that predicament really. So it was disappointing. (Campaigner 1, 999 Call)

The campaigners' dissatisfaction at the shortened hearing communicates a sense of being processed too quickly in view of their hugely resource-intensive preparation for the claim and patience progressing through the long process. The shortened hearing seemingly undermined the campaigners' participatory desire to engage in the administration of law,[38] through properly

[35] See also Paul Virilio, *Speed and Politics* (Semiotexte 2006).

[36] Hambly and Gill (n 31) 10.

[37] 999 Call for the NHS, 'ENDINGS AND BEGINNINGS' (Update in '#Justice4NHS – Stage 5 – Court of Appeal') (CrowdJustice, 22 November 2018) <https://www.crowdjustice.com/case/justice4nhs-stage5-courtofappeal/>.

[38] See Conor Crummey, 'Why Fair Procedures Always Make a Difference' (2020) 83(6) MLR 1221, 1238.

arguing the points they had permission for. We cannot know the reasons for the judges' swifter-than-expected conclusion, and whether an efficiency logic was implicit. The campaigners, though, experienced this as a rushing of the process imposed from above. Uneven dynamics of power thus come through in temporalities and, while partly a case management feature, it is received as a fair process issue, and might contribute to feelings, discussed in Chapter Eight, of power being entrenched in the establishment. Emerging from these temporal tensions, then, is the power imbalance between claimants and the judiciary,[39] which can quicken the pace and conclusion of hearings, and the state. Meanwhile, claimants abide by the process, wait, and accept what they are given.

Conclusion

This chapter has again communicated that judicial review is far from a simple endeavour gamed frivolously by claimants, even crowdfunded ones. It therefore echoes and resonates with Chapter Six, illustrating, through exploring the contrasting temporalities of crowdfunding and judicial review, some of the structural challenges claimants experience upon encountering the system. A key focus here has been crowdfunding's interaction with the requirements of judicial review's pre-action stages. Notwithstanding the scope claimants may have to use judicial review's linearity for publicity and to communicate a case, they are, crucially, not in control of the timeline – how they conduct their crowdfunding campaign is shaped by institutional temporalities delineated by core system designers. The experiences of legal quickening and delay reinforce these suggestions, with claimants perceiving themselves, and their expectations of a timely or thorough hearing, as powerless relative to the courts' caseload management. These observations usefully remind us that claimants cannot simply run roughshod over the established order, as framings of judicial review as being spuriously abused by political activists may imply.[40] Peculiarly, such narratives around judicial review and judicial power might be said to pay insufficient regard to the courts' power to structure and regulate the caseload in a manner that constrains claimants. As the chapter's introduction indicated, these suggestions from the case studies are not necessarily problematic – there is often a legitimate case for procedural strictness and efficiency, as some discussion of procedural rigour

[39] Hambly and Gill (n 31), 28.

[40] Such as those of ministers of successive governments referred to in Chapter Six.

demonstrates.[41] The observations should, though, help to dilute the perception proliferated by some government ministers that the judicial review process is easily manipulated by campaigners to their own ends. Though supported by rigorous qualitative research, this claim may well prove contentious.

On a perhaps less divisive note, one concern seemingly shared across commentators on crowdfunding is its capacity to (re)produce inequality in which claims and causes can proceed. The chapter's discussion of political salience and fundraising prospects may add further weight to this, once again demonstrating the value of more stable and reliable funding options not contingent on linking claims to 'hot' policy issues. The market-based cadence and logic of crowdfunding, discussed in Chapter Six, gives rise to such concerns of instability and luck,[42] where the public's fundraising behaviour may be influenced by political externalities which might be at best indirectly related to the claim's facts or merit. Again, while crowdfunding is vital for those short of funding options, the model's marketised logic ought to be resisted.

The chapter is, then, fundamentally a study in the varying points of tension and coordination between the temporal characteristics of judicial review and crowdfunding. In doing so, though, it demonstrates more widely that an attentiveness to temporality can benefit understandings of judicial review of executive action. The system's pre-action and case management features are characterised by temporality in design and execution – see time limits, the linear structure of pre-action caseload filters, and issues of delay – and it is somewhat inevitable that handling a burgeoning caseload requires considerations of efficiency and streamlining. As study of judicial review procedure hopefully becomes more widespread,[43] the chapter should demonstrate the value of time and temporality as an analytical tool with which to interpret the workings of the system. In paying attention to the process' temporal rhythm, this framework can make visible, and potentially problematise, the function of time in judicial review and the interests which it may serve or exclude, as part of increased focus on the work of system designers of administrative law and justice.

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[41] See Lee Marsons, 'Crossing the t's and dotting the i's: The turn to procedural rigour in judicial review' [2023] PL 29. Equally, see principled discussion of ensuring efficiency in judicial review: Fordham et al (n 8).

[42] Elsewhere, I discuss luck as an arbitrary, market-based feature of judicial review crowdfunding: Sam Guy, 'Access to justice on the market: An empirical case study on the dynamics of crowdfunding judicial reviews' [2021] PL 678.

[43] Something I call for in the thesis' concluding chapter.

Chapter Eight: "Once you step into the legal arena, different rules start to apply" – Legal Consciousness and the Limits of Litigation

Introduction

The efficacy and suitability of litigation to address social issues has, for many years, in equal measure beguiled and riled public commentators and scholars of public law and legal mobilisation. The contentious entry of crowdfunding into the public interest litigation landscape has only intensified this discussion. This chapter turns to case study participants' perceptions of litigation as a tool for change, especially among those groups and actors perhaps considered more radical, using the analytic concept of legal consciousness to understand and frame these actors' complex and multifaceted orientations towards law. These radical actors at once use law to prolong social struggles, at times expressing a certain deferential respect for the judicial review process, while articulating a clear (and compelling) perception of law and litigation as a limited tool of the establishment not designed for radical change, which operates on its own moral logic and is procedural and technical in character. Ultimately, what is expressed most strongly is frustration and resignation towards failures of accountability in the political realm which actors regard as both forcing their hand to turn to litigation (with little effective political avenue of challenge), and explaining the limited efficacy of courts, a body set up by the establishment for limited purposes. These campaigners elaborate the classic distinction between process and merits in judicial review, and the general reluctance to review the latter and effectively step into the role of first instance decision-maker, which can inhibit law's reformist potential for many a social campaigner. Rather than articulate loyalty to an alternative conception of 'higher' law, they yearn to engage in a political environment capable of acknowledging their concerns – the turn to law is an imperfect second choice. As Chapters Six and Seven indicated, judicial review is far from a Wild West subject to the whims of crowdfunded litigants. Its narrow scope is a source of frustration for some more radical actors, and the caseload can be managed in a manner that limits the effectiveness of crowdfunded litigation strategies and maintains power differentials which make legal mobilisation incredibly difficult for claimants.

This tension is hardly specific to crowdfunded judicial reviews, of course, and is common to questions about the utility and appropriateness of litigation for social reform, both among critical (left) law and society scholars and commentators concerned with preserving the legal system's neutrality from 'politics by another means'. That said, the disconnect between the hopes of litigation in the mind of lay campaigners and donors, and the limited reality of

judicial review, is often raised as a key reservation (to put it mildly) with crowdfunding.[1] Here, I share a concern with some of crowdfunding's critics. More so than in public interest litigation funded through more traditional avenues, crowdfunded claims will see publics invest hope in the myth of law, perhaps without fully understanding its limited practical utility. An attention to the public understanding of law, and to managing donors' expectations, is thus important.

The chapter proceeds as follows. First, it briefly outlines the legal consciousness concept, a useful framework for understanding social reform actors' perceptions of law. Second, it analyses the complex orientations towards law of some case study actors, highlighting their critical perceptions of a process they nonetheless feel compelled to use. Third, it evaluates the contentious matter of public understandings of law among crowdfunding users and donors. In these ways, alongside addressing a core source of heat and friction in the public debates around crowdfunding, it adds to the growing scholarship exploring the multifaceted, often contradictory, legal consciousnesses of social actors encountering, and attempting to counter or game, law's hegemonic structural power.

Legal consciousness – a précis

First, an understanding of legal consciousness is necessary to frame the chapter's discussion. Legal consciousness scholarship, while of relatively recent import to the UK,[2] is incredibly broad-ranging – this breadth extends even to scholars' conceptions of what is meant by 'legal' and 'consciousness', so this discussion will inevitably be non-exhaustive.[3] The concept prioritises ordinary people's understandings and orientations as to official state law, and to other norms shaping their world –[4] it explores how law structures everyday thoughts and actions, and shapes how people give meaning to social life and relations.[5] With roots in critical theory and

[1] Indeed, I raised this in Chapter Two.

[2] For early adopters on these shores, see Davina Cooper, 'Local Government Legal Consciousness in the Shadow of Juridification' (1995) 22(4) J.L.Soc'y 506; Dave Cowan, 'Legal Consciousness: Some Observations' (2004) 67(6) MLR 928.

[3] For useful discussion of the various strands of scholarship, see Simon Halliday, 'After Hegemony: The Varieties of Legal Consciousness Research' (2019) 28(6) S.& L.S. 859.

[4] Chris Gill and Naomi Creutzfeldt, The 'Ombuds Watchers': Collective Dissent and Legal Protest Among Users of Public Services Ombuds (2018) 27(3) S.& L.S. 367, 372.

[5] Simon Halliday and Bronwen Morgan, 'I Fought the Law and the Law Won? Legal Consciousness and the Critical Imagination' (2013) 66(1) CLP 1.

Critical Legal Studies, much – although by no means all – legal consciousness scholarship has looked to understand empirically what critical scholars had developed as a theoretical postulate: how state law retains its hegemonic power in 'sustaining domination'.[6] That is, it addresses the empirical puzzle of how state law maintains public faith and support despite consistently falling short of the promises told about it by the legal profession.[7] The twin notions of 'legality' and 'consciousness' are, of course, central. For the most part, scholars here interpret the 'legal' broadly, looking beyond provisions of official state law to draw attention to 'legality' – how people perceive state and non-state law.[8] Ewick and Silbey, in perhaps the field's defining text, term legality 'the meanings, sources of authority, and cultural practices that are commonly recognized as legal, regardless of who employs them or for what ends' – people may thus invoke legality 'in ways neither approved nor acknowledged by the law'.[9] Turning to 'consciousness', this is not limited to what people think about law – indeed, how people do not think about law, but take assumptions about it for granted, is important.[10] Crucially, it includes what people do in relation to law, which can reveal what they do not necessarily articulate.[11] Ewick and Silbey regard 'consciousness' as a socio-cultural practice wherein individuals give meaning to their worlds; these meanings assigned to social structures are then institutionalised and reproduced through socialisation, leading to certain assumptions becoming taken-for-granted.[12] In this way, as Merry argues, consciousness is how 'people conceive of the 'natural' and normal way of doing things', and 'their commonsense

[6] Bronwen Morgan and Declan Kuch, 'Radical transactionalism: Legal consciousness, diverse economies, and the sharing economy' (2015) 42(4) J.L.Soc'y 556; Antonia Layard and Jane Milling, 'Creative place-making: where legal geography meets legal consciousness' in Saskia Warren and Phil Jones (eds), *Creative Economies, Creative Communities: Rethinking Place, Policy and Practice* (Routledge 2015).

[7] Susan Silbey, 'After Legal Consciousness' (2005) 1 Annu. Rev. Law Soc. Sci. 323, 326.

[8] Anna-Maria Marshall, 'Injustice Frames, Legality, and the Everyday Construction of Sexual Harassment' (2003) 28(3) L.& Soc.Inquiry 659. For discussion of scholars' divergent definitions of the 'legal', see Stergios Aidinlis, 'Defining the 'legal': two conceptions of legal consciousness and legal alienation in administrative justice research' (2019) 41(4) JSWFL 495.

[9] Patricia Ewick and Susan Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago University Press 1998), 22.

[10] Laura Beth Nielsen, 'Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens about Law and Street Harassment' 34(4) L.& Soc'y Rev. 1055, 1059.

[11] Halliday (n 3), 863.

[12] Ewick and Silbey (n 9), 39, 225.

understanding of the world'.[13] Consciousness, then, reflects the meanings people give to legality in what they (do not) say and (do not) do.[14]

Capturing this understanding that legality is ubiquitous – that 'the law is all over' –[15] and that cultural practices of meaning-making sustain state law's hegemonic power, Ewick and Silbey developed a highly influential scheme of three narratives of legality. These three different orientations towards, and characterisations of, law in society are adopted and reproduced in everyday life. As Halliday and Morgan put it, the 'unit of analysis here is the discourse, not the individual' –[16] we should not regard individuals' consciousnesses as mapping precisely onto one characterisation at a particular time; actors can express divergent responses to law – such is the complex, often contradictory nature of empirical reality – and these also operate as general orientations towards law at the structural level. The three cultural narratives are as follows.[17] First, 'before the law' situates law as existing separately from and above society. Law's power to correctly and legitimately resolve problems is reified – persuaded by this, people transfer their power to control problems to the law. Second, 'with the law' approaches the law as a morally neutral game played in pursuit of actors' strategic goals, recognising the scope for contestation, in contrast to the 'before' narrative's apparent powerless deference to law's promises of fairness and justice. Third, 'against the law' captures a scepticism and disloyalty towards law's legitimacy and unpredictable implementation, characterised by small moments of resistance by individuals where opportunities arise to dissent. Ewick and Silbey posited that the interaction of the 'before' and 'with' the law narratives sustain law's hegemony – the core interest of at least the critical legal consciousness scholars. The invocation of both narratives at different points maintains uncontested societal faith and consent in law and legality's power – as at once 'both a reified transcendent realm, and yet a game'.[18]

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[13] Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans* (Chicago University Press 1990), 5.

[14] Dave Cowan and Rosie Harding, 'Legal Consciousness and Administrative Justice' in Marc Hertogh et al (eds), *The Oxford Handbook of Administrative Justice* (OUP 2021), 439.

[15] Austin Sarat, "…The Law Is All Over': Power, Resistance and the Legal Consciousness of the Welfare Poor (1990) 2(2) Yale J.L.& Human. 343.

[16] Halliday and Morgan (n 5), 12.

[17] Ewick and Silbey (n 9).

[18] Ewick and Silbey (n 9), 231.

These cultural schemes have offered a powerful framework for capturing types of individual orientation to law and exploring the social-structural puzzle of law's hegemonic power – although, as Silbey herself has expressed, some subsequent scholarship has lost sight of the structural explanatory purpose.[19] A particularly fruitful recent line of enquiry, though, has plugged a lacuna in the initial tripartite schema concerning resistance to law's hegemony.[20] Harding, for example, identifies three forms of resistance: stabilising, moderating, and fracturing.[21] This emphasis on counter-hegemonic resistance has occurred amid concern about alienation from law, particularly from Marc Hertogh.[22] Crucially, while Ewick and Silbey's 'against' narrative highlighted individuals' minor and personal moments of resistance, scholars have argued that they overlooked a fourth 'missing narrative' of *collective* dissent seeking to alter law's power structures.[23] Fritsvold termed this fourth narrative 'under the law', characterised by flagrant law-breaking flowing from a fundamental rejection of state law's legitimacy, challenging its hegemony.[24] Halliday and Morgan refined the consciousness narratives with reference to Douglas' framework of cultural theory,[25] across cultural types varying according to 'grid' and 'group' dimensions of social organisation. The 'grid' dimension regards the extent a society accepts and defers to hierarchies of authority (high grid) or opposes hierarchical difference (low grid); the 'group' dimension concerns the degree a society favours individual freedom (low group) or group interests (high group). Applied to legal consciousness narratives, Halliday and Morgan argue the 'grid' reflects the extent state law commands respect due to its formal status, while the 'group' captures the degree that individualised or collective interests affect orientations towards legality – this also indicates, when law is approached as a game, whose interests the game is played for.[26] As such, cultural theory's ideal types

[19] Silbey (n 7).

[20] Cowan and Harding (n 14), 440-441.

[21] Rosie Harding, *Regulating Sexuality: Legal Consciousness in Lesbian and Gay Lives* (Routledge 2011).

[22] Marc Hertogh, 'Loyalists, cynics and outsiders: who are the critics of the justice system in the UK and the Netherlands?' (2011) 7(1) Int. J.L.C. 31; Marc Hertogh, *Nobody's Law: Legal Consciousness and Legal Alienation in Everyday Life* (Palgrave Macmillan 2018).

[23] Halliday and Morgan (n 5), 28.

[24] Erik D Fritsvold, 'Under the Law: Legal Consciousness and Radical Environmental Activism' (2009) 34(4) L.& Soc.Inquiry 799.

[25] See for instance Mary Douglas, *Thought Styles: Critical Essays on Good Taste* (Sage 1996); Mary Douglas, 'Introduction to Group-Grid Analysis' in Mary Douglas (ed), *Essays in the Sociology of Perception* (Routledge and Kegan Paul 1982).

[26] Halliday and Morgan (n 5), 9-10.

supplement Ewick and Silbey's three legal consciousness narratives: 'before the law'/deferential collectivism (high grid/high group); 'with the law'/individualism (low grid/low group); 'against the law'/isolation or fatalism (high grid/low group).[27] The fourth cultural theory type – dissenting collectivism (low grid/high group) – lacks a parallel in Ewick and Silbey's account but resonates with Fritsvold's 'under the law' narrative, and Halliday and Morgan argue dissenting collectives have three core strands: an understanding that formal law is fundamentally illegitimate; a developing alternative conception of law more closely connected to justice and ethics emerging from elsewhere than the state;[28] and a willingness to play games with state law, even while (or, indeed, because) believing it illegitimate.[29] Whereas the individualism/'with the law' type sees the individual play games with law for their own interests, the dissenting collective has a clear collective identity, perceiving itself to represent groups disadvantaged by the socio-political architecture.[30] This has since proven a very useful framework for conceptualising, and testing empirically, counter-hegemonic social movements' orientations towards law.[31]

This section has briefly engaged with the growing legal consciousness literature, highlighting the fruitful strand of research analysing activists' complex narratives about law. The following section employs this framework to interrogate the multifaceted orientations to law of groups within the dataset, especially those less experienced with litigation.

Contesting on establishment terms

This section turns to the accounts of participants within the case studies, exploring their multifaceted orientations towards law, assisted by the legal consciousness concept. Lehoucq and Taylor note that legal mobilisation, the thesis' core theoretical framework, interrelates (and overlaps) with legal consciousness – legal mobilisation concerns explicit, self-conscious uses of formal legal mechanisms, while legal consciousness addresses implicit, non-articulated uses

[27] Halliday and Morgan (n 5), 11-12.

[28] For instance, from God: Joshua C Wilson, 'Sustaining the State: Legal Consciousness and the Construction of Legality in Competing Abortion Activists' Narratives' (2011) 36(2) L.& Soc.Inquiry 455.

[29] Halliday and Morgan (n 5), 15-16.

[30] Halliday and Morgan (n 5), 16.

[31] For instance Jessy Bailly, 'When activists speak law to powerholders: comparative insights' (2022) Social Movement Studies (EarlyView); Gill and Creutzfeldt (n 4).

of law to give events meaning.[32] The section thus offers a different but related perspective on social change litigation, interrogating actors' understandings of litigation strategies in light of law's hegemony. It depicts, among actors in more radical collectives, primarily 999 Call for the NHS and Up the Elephant, paradoxical deployment of litigation to serve social struggles, while acknowledging law's structural limitations in upholding hegemonic power, stifling radical change, and being frustratingly amoral by design.

It might at first glance seem odd to suggest groups litigating proactively,[33] deciding to invoke courts to enforce or interpret legal protections, may be cynical of law's power. Indeed, some case study groups who may be considered less radical expressed more straightforward faith in the role of law. For instance, for CARA, a residents' association which, as Chapter Three outlined, turned to law following an egregious error in an initial grant of planning permission in 2014, members expressed belief in the law's capacity to right that decision's wrong:

> before we had the judgment, the written judgment, I thought that the judge would actually decide in our favour – not because she was in any sense other than absolutely, scrupulously fair (Member 2, CARA).

This aligns with the perspective of Lieven J herself, that 'the interests of the credibility of the planning system' demanded the offending planning permission be quashed,[34] and demonstrates fundamental faith in legal accountability's integrity and fairness.

Yet for 999 Call and the Up the Elephant, both involving actors with experience in socio-political campaigning (but inexperienced in judicial review), participants' interviews reflected complex and mixed narratives around state law, even as they made the positive decision to litigate on its terms to pursue their aims. At times, these accounts admired features of the legal process, for instance the unique value of coming before establishment processes, as one 999 Call campaigner detailed:

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[32] Emilio Lehoucq and Whitney K Taylor, 'Conceptualizing Legal Mobilisation: How Should We Understand the Deployment of Legal Strategies?' (2020) 45 L.& Soc.Inquiry 166, 178-179.

[33] As distinct from reactive litigation, where groups have litigation forced upon them – see Carol Harlow and Richard Rawlings, *Pressure Through Law* (Routledge 1992), 7.

[34] *R (Croyde Area Residents Association) v North Devon District Council* [2021] EWHC 646 (Admin); [2021] PTSR 1514, Lieven J at [86].

> it felt good to be in court, it felt justified, and also it felt like, yes it's the establishment, but there has to be some good things about the establishment hopefully. So it felt good to be participating in that process too, I think, because otherwise you can easily be dismissed as campaign groups, just the rabble on the edge of the street with their placards and it gave us a chance to present ourselves in a whole new way and I think people really liked it. (Campaigner 1, 999 Call)

For Up the Elephant, a campaigner expressed further respect for law's form and the expertise of its profession, somewhat reifying this above their own lay perspective:

> what I am always impressed by was how quickly all the barristers, all the solicitors, and all the judges pick up the information that they're supplied with … And the diligence, I don't think I could complain about that, with which they go through every ground … and then they've got to bring in the precedents that exist, and then they've got to listen to the three sets of barristers … and obviously, I have no argument at all with their legal knowledge, I can't, you know, I have no legal knowledge to speak of, so I can't fault that. So their diligence, the manner in which they conducted the case and all the rest of it … no quarrel with at all. (Campaigner 1, Up the Elephant)

Both accounts admired the law's form on its own terms – respectively, as part of "the establishment", and as a diligent profession of superior knowledge and capabilities. Perhaps reminiscent of the dissenting collective narrative, campaigners in these groups often framed judicial review as a mechanism of establishment design characterised by limited scope for moral or substantive contestation. As a 999 Call campaigner put it, "law will always argue the legal point, as opposed to considering the consequences of that legal point" (Campaigner 1, 999 Call). An Up the Elephant campaigner similarly distinguished the scope for legal challenge and broader questions of justice and fairness:

> once you step into the legal arena … different rules start to apply. And, what you might think as a campaigner as being fair or unfair, right or wrong, you have to put to one side. You would hope that … what you think is unfair or fair is reflected in the decisions that you get in the legal arena, but that isn't the case at all I'm afraid. The imbalance of forces is stark … you really are up against it, so there is no sort of equality of arms (Campaigner 1, Up the Elephant).

These are familiar, and indeed compelling, sentiments. They draw attention, of course, to the classical distinction between substance and procedure in judicial review – grounds are, for the

most part, technical in character, concerned less with a first-instance decision's substantive rightness than with it having been made appropriately. Arvind and Stirton, in a provocative and convincing historical account, argue that the modern doctrine of judicial review has failed to achieve its founding objectives because it has been designed to eschew questions of merit, even though, in the 1960s during early system design, it was taken for granted that judicial redress must address a grievance's merits.[35] In a system committed to avoiding consideration of merits, a decision to bring a claim and take policy contestation from the 'political' into the 'legal' realm results in speaking in and engaging with 'distinctively legal' grounds of challenge.[36] While claims, especially those in planning and environmental, can often appear to some degree driven by disagreement on merits,[37] the technical and procedural 'legal stock' shapes how claimants can articulate and frame their arguments, structuring which facts and issues are relevant and acceptable.[38] This aligns with McAuslan's critique that planning case law transforms genuine disputes over local effects into matters of legal technicality.[39] Judicial review's procedural stock reduces the capacity to oppose the policy assumptions underlying a particular decision or to advance alternative policy framings, as litigants' submissions need to satisfy 'legal vocabularies'.[40]

This resonates strongly with the orientations towards law of Up the Elephant campaigners in their planning dispute. They approached the litigation "with a fairly realistic expectation of our chances of success", that is, "less than 50/50", given it is "quite a high bar to win a judicial review" and courts "tend to give the local authority the benefit of the doubt in these kinds of decisions" (Campaigner 1, Up the Elephant). Equally, campaigners were alive to the practical limitations of quashing, despite it representing the holy grail remedy in this context:

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[35] TT Arvind and Lindsay Stirton, 'The curious origins of judicial review' (2017) 133 LQR 91, 92, 96.

[36] Ole W Pedersen and Anthony R Zito, 'Fracking frames and the courts' (2018) 20(4) ELR 202, 207.

[37] Ole W Pedersen, 'A Study of Administrative Environmental Decision-Making before the Courts' (2019) 31(1) JEL 59, 67-68; Richard Macrory and Michael Woods, *Modernizing Environmental Justice* (Centre for Law and the Environment, UCL 2003), 21-22.

[38] Ellen Ann Andersen, *Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation* (University of Michigan Press 2004), 12.

[39] JPWB McAuslan, 'Planning Law's Contribution to the Problems of an Urban Society' (1974) 37 MLR 134. For an alternative perspective on 'legalness', see Elizabeth Fisher, 'Law and Energy Transitions: Wind Turbines and Planning Law in the UK' (2018) 38(3) OJLS 528, 543-544.

[40] Pedersen and Zito (n 36), 207-8.

> Even if we did win on the judicial review then it could have just meant that the Council required an amended application … so if the decision had been overturned, then that wouldn't have been the end necessarily … Technically, what could happen is the Council then just says to the developer 'produce a different scheme' … and of course they produce a scheme which wouldn't risk judicial review … even winning the judicial review isn't in and of itself going to win the battle. (Campaigner 2, Up the Elephant)

Such comments on the difficult landscape for achieving gains through judicial review reflect campaigners' wider awareness and criticism of the procedure. Some critique took on a world-weary character:

> it's interesting because a lot of people that are maybe new to campaigning or not that experienced often think there's a legal way out. They really put a lot of store by, 'oh, there must be something you can do legally' (Campaigner 2, Up the Elephant)

Commenting on losing the claim, one campaigner noted that most people were unsurprised, except potentially those:

> who think that perhaps there's a legal route out of very clearly political questions about power and control, control of our environment in our society, and who are perhaps not so knowledgeable about the role of the legal system in maintaining the power of the political establishment. (Campaigner 2, Up the Elephant)

This presents something of a paradox: some campaigners view law as a tool of limited utility that is closely linked to and preserves socio-political hegemony, yet though expressing dissent, they chose to use the process. One campaigner acknowledged this:

> we did have this kind of central contradiction within the campaign. Which is that the campaign was about, effectively, amending the application … to make it more palatable and less devastating for the traders. The campaign was not about … stopping the demolition of the shopping centre … and of course, the crowdfunding and the judicial review doesn't deal with that at all … probably the majority of people who supported the campaign could all see the best outcome would be that the shopping centre remains, it gets refurbished and the Council get somebody to look after it … but, in order to get that, you have to go far beyond the parameters of our campaign. There would have to be, and there never was, an ability for the traders to organise themselves independently … what we were fighting for was a better deal for traders, more relocation money, more relocation space, a better outcome all round for those that are displaced. That's what we

were fighting for, because we were fighting on planning terms. (Campaigner 2, Up the Elephant)

This was framed as "a limitation" of "crowdfunding for a judicial review", that "you're not necessarily dealing with the problem at the root" (Campaigner 2, Up the Elephant). Mirroring starkly the notion of using law's gaming potential for collective goals, as in the dissenting collective narrative, another campaigner reflected on the claim's technical affordable housing grounds, suggesting "[i]t all comes down to wording", and "it's interesting kind of the game you have to play" (Campaigner 3, Up the Elephant). Yet, they also expressed an overwhelming fatalism regarding the prospect of using law productively, when developers could evade accountability. Reflecting on observing judicial review for the first time, they highlighted:

> with a lot of this stuff, what is written in these legal agreements and what is written in the law, basically realising none of that matters. Because at the end of the day, the property developers will do exactly what they want to do … The Council can only come back and say you haven't done what you said you were going to do, they take them to court, but the property developers always have endless amounts of money to throw into lawyers, so that they can kick these cases into the long grass … And that's why hearing all the stuff about 'oh well actually this is how many houses we're going to build' … if they don't build them, what the hell are the Council going to do? … So, I'd say realising that basically the law … doesn't matter, like when their name is on the dotted line to do it, they can just basically do it (Campaigner 3, Up the Elephant).

The campaigners, in effect, felt little choice but to contest the development on planning terms and through law, in lieu of compelling political strategies.

> you can take various legal routes, such as going to judicial review, but I would say they should be secondary really … most of these questions are political questions which should be decided through the political process … your councillors should be deciding, and I guess that is what we would prefer to see, we would prefer better decisions before we even get to that, we'd prefer the local authority insisting on greater levels of affordable housing, insisting on greater levels of social rental housing and rejecting planning applications that don't have them before it comes to us, as it were, to challenge them. We'd be happy to support the council if it was doing more of that. And the council has shifted somewhat (Campaigner 1, Up the Elephant).

The participants seemingly yearn – as do 999 Call campaigners, discussed subsequently – for the cut-and-thrust of political contestation that takes seriously and presents real prospects for outsider positions. It appears they feel keenly the perceived lack of political opportunity, resulting in their proactive use of law while recognising its place in sustaining hegemony. An Up the Elephant campaigner reflected:

> this campaign started with objections, planning objections … not political objections in the sense of 'we're against this scheme because you're going to displace a whole community' … we were objecting on planning terms, so planning is very, very limited as to what kind of objections, and so it has its own logic right from the beginning. Which you really can't get away from unless you take a whole completely different revolutionary approach, but you can only do that if you have, if you like, an insurgent mass of people that are affected by this and are prepared to say 'we are fighting to stop this scheme completely and for a whole different vision', rather than 'we are fighting for reforms to this scheme which will make life better for us in terms of managing our displacement'. And we never had that (Campaigner 2, Up the Elephant).

The paradox here goes to the heart of a common limitation of mobilising judicial review, at least when looking at achieving direct change from judgments and remedies, with Rosenberg framing litigation as a 'fly-paper' offering a 'hollow hope' causing progressive campaigners to transfer substantive policy battles into legal disputes.[41] The affordable housing grounds were, of course, a narrower basis of challenge than the campaign's wider objectives – and perhaps some following the campaign expected or hoped that the litigation could address more than what was possible, although the data collected here do not confidently enable claims to that effect. The issues around regeneration, gentrification, affordable housing, and the treatment of marginalised communities have a rich political history in Southwark, and launching the judicial review moved contestation from the 'political' to the 'legal' – albeit political contestation occurred alongside the litigation. The limited legal stock and vocabularies structured the issues relevant to the dispute and removed from view the opposition to the policy assumptions concerning the Delancey development and the shopping centre's demolition which undergird the affordable housing provision under challenge. Political context and struggle, including the ethnic minority traders' experiences, was not relevant to the depoliticised grounds of claim,

[41] Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (University of Chicago Press 1991), 341.

where the doctrinally built-in deference to the planning authority exemplifies the narrow policy frame the campaign was working within. This had also been the case, it was suggested, when engaging in the planning system prior to litigating, contesting throughout on limited "planning terms". This is an important caveat to the argument in Chapter Five that law can be normatively appealing because of its hard-edged nature and perceived neutrality – for those more critical of law's hegemonic power, this authoritativeness may have less innate appeal, and their use of law may be more instrumental. Even so, law's popular image as an appropriate, neutral, and powerful arbiter may endure among supporters and crowdfunding donors – as discussed below.

For 999 Call, campaigners were similarly forlorn as to the limited scope for radical politics, and law's place in this landscape. One campaigner detailed how, in the campaign surrounding the litigation, "it became our catchphrase that this isn't just a campaign for the NHS, it's a campaign for democracy", as they "felt that the whole process by which the government had … undermined the NHS was fundamentally undemocratic". With the policies in the Health and Social Care Act 2012 absent from the 2010 general election manifestos, and with campaigners claiming to encounter "smoke and mirrors and deliberate confusion" when consulted on hospital cuts, group members became "completely disgusted and distrustful of authority" (Campaigner 2, 999 Call). Another lamented the parliamentary opposition's failure to deliver accountability – "[t]he big frustration is that I feel that much more could have been done by the Labour Party to prevent this" (Campaigner 4, 999 Call). Into this concern about political accountability, the role of law in questions of power was articulated, again fatalistically:

> The [judges] kept making the case that they had to judge on issues of law and they couldn't make a comment about the validity or rightness of our campaign, all they could talk about was matters of law. And it does seem to me that there's something very odd when the masters of law cannot be seen to support what may or may not be right and ethical. And so it's brought me right back to thinking about the process of law-making in Parliament … and I have huge questions now about – and it comes back to our thing about, this isn't just a campaign about the NHS it's a campaign about democracy, I think that our political system is broke, it's dysfunctional. I think that, until we get a properly representative Parliament through a fair system of proportional representation … we will never have a functional Parliament and until we get a properly elected Second Chamber, we will never have a properly functional Parliament because the House of Lords is actually been doing amazing work … but they're limited because in the end

> they can't oppose anything that's been voted for by the electorate, and so … this judicial review and the one that we did more recently against Centene, they've just made me look at the process of law-making and realise that we're not living in a democracy, and that the process of making the laws which we then have to use to try and make public authorities act within the door is just not fit for purpose (Campaigner 2, 999 Call)

Much like classic left-leaning articulations of political constitutionalism,[42] politics is acknowledged to, in theory, provide the most transformative hopes of achieving collective goals and continuing social progress. And yet, the perceived lack of scope in practice for politics on a level playing field has driven a turn to law as a second-class option. Looking beyond these two case studies, we find some resonance in one campaigner's views on the Immigration Exemption claim. Discussing the government's disappointing remedial response to losing the claim – since ruled unlawful –[43] they noted:

> it was really indicative of how something that in law is a remedy is not necessarily a remedy or an answer to the underlying political problem … And for something that was considered quite a strong victory to us … if I was a member of the public, I wouldn't understand how on earth that's supposed to be a victory if the government can still get away with suggesting the most inadequate responses to the judgment (Campaigner 2, the3million/ORG).

This perspective is unique and telling as, unlike Up the Elephant or 999 Call, the claimants here won their claim:

> when we're losing it's easier to think 'oh, if we won, things would have been better', but then you technically win … and things are still a little bit convoluted, it's not very clear cut what a victory means in this context (Campaigner 2, the3million/ORG).

Much of this concern around law's complex place in sustaining or resisting political power is common to questions about the utility of litigating for social change, a debate which, though

[42] Such as that of JAG Griffith, e.g. in 'The Political Constitution' (1979) 42(1) MLR 1; and Martin Loughlin, e.g. in *Against Constitutionalism* (Harvard University Press 2022) and 'The Political Constitution Revisited' (2019) 30(1) KLJ 5.

[43] *R (the3million and anor) v Secretary of State for the Home Department and anor* [2023] EWHC 713 (Admin).

arguably intensified among the commentariat by crowdfunding,[44] is hardly a novel issue. There are, though, unique challenges added to this dilemma when using crowdfunding to litigate. On this note, we approach the chapter's final substantive section, addressing tensions in seeking money from donors for litigation pursuing social change, enrolling publics into potentially placing faith in the potential of judicial review even if the likelihood of delivering change is unreliable at best.

Managing 'the crowd'

The quandaries discussed thus far have been widely applicable to actors using law for change. This section, though, engages with a particular dynamic arising where litigation for change is crowdfunded: the role of the crowd itself. Though claimants themselves may wrestle with the value of using law while sceptical of the establishment, the orientations towards law of their donors are another matter entirely. Donors may not have thought through the mythic nature of law's potential for delivering social change, and, being less closely involved in the litigation than the claimants, may be prone to unduly raising expectations of change. While this study did not engage with donors directly, we can derive clues as to the public understanding of law in the cases through core actors' accounts.

The notion of 'the crowd' has been resignified in recent years across several contexts – crowd-testing software, 'the wisdom of the crowd', crowdsourcing – to no longer represent a savage pack but a productive social and economic agent.[45] Social psychologists have argued individuals in a crowd gain a collective identity, however momentary, which can generate a shared sense of identification and commonality with others in the crowd.[46] In the justice context, though, involving 'the crowd' may justifiably raise concern about justice in the popular gallery,[47] which may disadvantage minority causes and unpopular claimants, and may blur the lines between legal merit and political salience – an issue of bad collective sentiment, or

[44] See for instance nuanced discussion in Colin Yeo, 'Strategic litigation: more harm than good?' (Free Movement, 28 November 2022) <https://freemovement.org.uk/strategic-litigation-more-harm-than-good/>. All webpages in this chapter last accessed 11 September 2023 unless otherwise stated.

[45] Illan rua Wall, 'The law of crowds' (2016) 36(3) LS 395, 396.

[46] Michael A Hogg, Deborah J Terry and Katherine M White, 'A tale of two theories: a critical comparison of identity theory with social identity theory' (1995) 58(4) Soc Psychol Q 255.

[47] This resonates with concerns as to popular justice, e.g. Carol Harlow, 'Public Law and Popular Justice' (2002) 65(1) MLR 1.

groupthink.[48] Just as proponents highlight the crowd's productive capacity to mobilise causes that would otherwise struggle for funding, critics of crowdfunding commonly warn of the crowd misplacing its faith and money. The crowd, then, is a contested and important collective actor when considering the ethical 'rightness' of crowdfunding – whether their money is used properly, and whether the crowd's decision-making power (potentially disconnected from justice or merit) ought to have such sway over what claims proceed.

A wider community's interest and participation in judicial review arises especially directly in crowdfunded claims. Continuing the above discussion of the government's disappointing remedial response to the Immigration Exemption judicial review, the campaigner elaborated:

> it did make me think how difficult it is to communicate those things, especially … in the context of crowdfunding … it's other people's money that allowed for this to happen. And I was reflecting on how accountability works in this context … Because for a victory it's a little bit messy, a little bit complicated and suddenly from telling people 'well the Home Office can have data on you and not tell you they have it and your rights are fundamentally inferior to everybody else's rights', here you're kind of moving to saying 'well that may still be the case, but you know, the [UK] has a difficult time in its relationship with the EU'… and I think for individuals supporting such JRs it's very tricky how you narrate it, how you justify what you're doing and how it all relates to rule of law and democracy … that we [highlight] when we ask people for donations (Campaigner 2, the3million/ORG).

Well-meaning campaigners may therefore experience a communication challenge in expressing litigation's complexities and policy implications to an audience keen to understand whether and how they have contributed financially to change, but whose experience of the claim and its wider context is far less direct. Campaigners thus face a difficult burden – donors' perceptions of administrative law and justice may well be shaped to some degree by the efficacy of 'accountability' in particular cases which they follow. The experience of CARA provides an interesting and, it appears, effective way of communicating about litigation to interested audiences:

> once we came out of lockdown and … during the appeal process, we did manage to have an open meeting for the first time, and we had loads of people turn up. And they

[48] Mirko Pečarič, 'Missing Links Between Crowds and Law' (2023) 24(2) GLJ 417, 423.

> were able to ask loads of questions about the case and why we'd done what we'd done … and why did it cost so much … and what would happen to the money if we won and what would happen if we didn't win … that was also a really important element … once we'd done that we ended up getting a lot more support as well from within the community (Member 1, CARA).

Perhaps most interesting in this account is the notion that local community support increased following transparent communication of the litigation process and the use of crowdfunds. Such communication, though, appears limited in scope to cases with a locally-concentrated supporter and donor base.

Where a claim has been unsuccessful, groups will need to tread carefully when communicating their disappointment. 999 Call, for instance, expressed dismay when updating their donors on the crowdfunding page after permission to appeal to the Supreme Court was denied, accompanied by an image using the hashtag '#JusticeDenied':

> [we] are disappointed and dismayed to have been let down by the legal process … we think the battle was definitely worth doing. Still, we are VERY surprised and disappointed that the Supreme Court has denied #Justice4NHS, by refusing permission for the final stage of our legal challenge to NHS England's cost-cutting Integrated Care Provider contract (formerly known as the Accountable Care Organisation Contract. Their ruling seems utterly illogical.[49]

This sentiment is understandable – criticism of judicial decision-making is, on its face, entirely legitimate, and unsuccessful campaigners are entitled to voice frustration and sadness at decisions. Still, we might regard as at least potentially problematic the communication of an emotive narrative, to donors supportive of the campaign, of courts 'denying justice' by refusing permission to the Supreme Court, a court which hears very few cases each year.[50] Though crowdfunding is undeniably important in enabling each case to proceed, donors are only tangentially involved in the claim – communicating to donors represents a challenge for litigants without prior experience explaining litigation outcomes to mailing lists of supporters. It might be argued that communicating to crowdfunding donors is little different to

[49] 999 Call for the NHS, 'We're not giving up!' (Update in '#Justice4NHS – Stage 5 – Court of Appeal') (CrowdJustice, 5 May 2019) <https://www.crowdjustice.com/case/justice4nhs-stage5-courtofappeal/>.

[50] See for instance Lewis Graham, 'UK Supreme Court: Data' (DR LEWIS GRAHAM) <https://lewisgrahamlaw.wordpress.com/2022/07/19/uk-supreme-court-data/>.

communicating to a campaign's lay supporters. Yet, for inexperienced litigants especially, accountability to donors represents a peculiar issue, involving explaining whether and how the donor's money was used satisfactorily, and justifying whether and how the litigation was worthwhile.

As the previous section indicated, the Up the Elephant coalition litigated based on affordable housing grounds, while largely opposed to the closure of the shopping centre and the development altogether, demonstrating the limitations of "fighting on planning terms". Some participants pondered whether the desire to stop the shopping centre's closure may have motivated some crowdfunding donations, despite the judicial review itself being more narrowly focused. In the opinion of a lawyer acting for Southwark Council:

> when we went to court, there was a massive demonstration, 'Save the Elephant shopping centre' etc, but that was kind of never really on the table in the JR, the JR was not really about saving it. There was one point that conceivably could have done, but it was their weakest point … the JR was actually about the detail of the affordable housing assuming the development takes place … it's the most technical judicial review … about the detail of the section 106, so why is there such a groundswell of the public financing this … I can see why there was, because the affordable housing is a big thing, but … the people that are funding it actually wanted to oppose the loss of the shopping centre (Lawyer 1, Southwark Council).

On the lawyer's view, the only ground that could have resulted in a quashing order, if successful, was ground one, alleging that the planning officer's report materially misled members on whether grant funding had been secured from the Greater London Authority to contribute towards increasing the affordable housing provision. The other grounds would more likely have resulted in revising the agreement, "giving us time to tidy it up rather than overturning the whole of the consent". In any event, at first instance, Dove J explained that, had ground one succeeded, he would have exercised his discretion to decline a quashing order.[51] The council's lawyer suggested that the campaign had "two separate strands": the claim made "searching and really quite intelligent" points on affordable housing, but this was "quite an unusual thing to crowdfund for"; meanwhile, the judicial review itself was unlikely to serve the wider 'Save the Elephant' objective. We should be careful, though, not to overstate the divide between campaigning to preserve the shopping centre and the litigation. After all,

[51] *Flynn v London Borough of Southwark Council* [2019] EWHC 3575 (Admin), Dove J at [57].

the claimant was granted permission to proceed as the grounds were arguable, including ground one, which could have gone to quashing the planning permission. Certainly, the coalition and its supporters were concerned with the wider scheme, including protecting market traders in the shopping centre, and affordable housing provision was one part of the overall contestation, but it was not out of the question that permission could have been quashed and then fought again when remitted to the planning committee.

Participants acknowledged, though, that campaigners must be conscious when crowdfunding not to raise public expectations of what a judicial review can contribute to the wider cause. Though the core campaigners were clear on law's place in the wider political contest, people in the wider network who donated and campaigned may well have placed hope in litigation that was unlikely to be met. The account of one campaigner may hint towards this:

> that was the weird thing, we hadn't, I don't think we'd actually even got the JR result when the shopping centre closed. I think we were waiting, we'd lost one, and we'd kicked back to see if we could have another review. So it was weird, the shopping centre was closing even though the judicial review was still in the, I mean talking about them just being able to do things, and the law not really mattering. I think that was a big 'oh they'll just do whatever the hell they want' (Campaigner 3, Up the Elephant).

If the judicial review was perceived to concern the shopping centre's closure, it would be understandable to see here the law's powerlessness in the face of determined developers. Absent donors' first-hand accounts in the case studies, we should be reluctant to speculate on their orientations to law. That said, Up the Elephant campaigners did reflect on liaising with the wider community.

The claim's grounds neatly demonstrate the complications of managing community participation in the litigation process. Much focus in the main letter before claim concerned issues affecting the traders, particularly regarding equality impact and consultation. A further pre-action letter was issued at a later stage focusing on affordable housing and errors in the section 106 agreement – some of which were rectified accordingly by the council pre-action, leading to some favourable concessions. Up the Elephant did not pursue the consultation and equality impact grounds because it was felt that "the bar is pretty low for the local authority, in lawfully meeting the public sector equality duty", and "in legal terms the local authority had done enough to at least survive a challenge" (Campaigner 1, Up the Elephant). The pivot to focusing on the section 106 was experienced by the other side as coming "pretty much from

left field", with "the case metamorphos[ing] into this really quite specialist deep dive into the detail of the affordable housing" (Lawyer 1, Southwark Council). Again, the explanation for this shift indicates an instrumental approach to what can be achieved by playing law's game, alongside a difficulty conveying to communities the limitations of law as a tool:

> it isn't about really what is right, it's about what you can win, and you have to take your legal advice very seriously. And communicating that sometimes to campaigners around you, it can be a little difficult. (Campaigner 1, Up the Elephant)

The campaigner elaborated upon this quandary:

> we did not go forward on the basis that there was anything wrong with the decision regarding the traders … But at the same time you want the traders' support, and they did give it. But then they'd also always be asking, 'well why aren't you making this argument about the traders, why aren't you making that argument.' And it is part of the legal process that the arguments start to get honed, the grounds start to narrow … and that can be difficult because … you don't like dropping what you think are reasonable points, but you have to if you're going to make any progress. And you have to concede sometimes that you're not going to get anywhere with something that looks as if it should be pushed. So … you've got to negotiate that, and you've got to try and keep people on board, and … keep people's confidence and faith in the process, and that can be quite difficult.

Evidently, there was a desire to represent the affected traders' interests in the grounds, seeking to use judicial review as a participatory avenue to represent marginalised communities' interests.[52] Yet the campaigners also faced a pragmatic attrition – the need to streamline a claim pre-action such that arguable grounds emerge. One campaigner reflected upon this:

> one issue which would be really compelling to the public … breaking up the shopping centre would be, you would lose the string of Latin American shops, and they exist as a cluster … that's something that … the public can really understand, but in court that's kind of [not accounted for] (Campaigner 3, Up the Elephant).

[52] This has some resonance with the participatory 'interest representation' view of judicial review. See Harlow (n 47); Richard B Stewart, 'The Reformation of American Administrative Law' (1975) 88(8) Harv.L.Rev. 1667. Both scholars express concern with emphasising participation in public law litigation, although others advance compelling defences – see for instance Jeff King, *Judging Social Rights* (CUP 2012).

With campaigners needing to play litigation's game, the claim did not proceed on a core focus of the campaign and pre-action correspondence which engaged the wider public and affected community, but was expected to be less legally arguable.

Legal commentators have, when discussing other crowdfunded cases, rightly criticised case owners who unhelpfully raised donors' expectations as to what law could provide. The barrister Barbara Rich, for example, discussed in a blog the crowdfunded judicial review claim arguing that legislation increasing the state pension age for women born in the 1950s was unlawful, which lost at the High Court and Court of Appeal.[53] Rich argued that the case owner and core campaigners raised 'supporters' expectations that not only were their legal arguments unquestionably bound to succeed, but also that success on the appeal would lead to "full restitution" of lost pension payments to women affected by the changes'.[54] With the campaign 'over-heighten[ing] expectations', including repeatedly publicly promising 'full restitution' despite the claim only seeking a declaration of unlawfulness – the loss was said to have undermined some supporters' confidence 'in the legal system and the integrity of the judges', with comments on social media alleging 'judicial incompetence, corruption or misogyny'.[55] Prior research has highlighted remedial differences between what citizens hope of administrative justice redress and what is available,[56] and there is certainly substance to the concern that expectations in some claims are divorced from what is realistic, such as in the challenge to the Coronavirus Act discussed in Chapter Two. To be clear, I am not suggesting that anything of this manner occurred in any of the case studies here, nor that those campaigners misled supporters. Far from it – Up the Elephant, for instance, were alert to the communication issue when crowdfunding, making sure to be "careful with the way that you say things" and to give the crowdfunding page "a cautious rendering" (Campaigner 2, Up the Elephant). 999 Call campaigners, meanwhile, noted that in promoting a claim, "you've got to stick to the legal, technical" issues and be careful in wording:

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[53] *R (Delve and anor) v Secretary of State for Work and Pensions* [2019] EWHC 2552 (Admin); *R (Delve and anor) v Secretary of State for Work and Pensions* [2020] EWCA Civ 1199.

[54] Barbara Rich, 'A #BackTo60 Setback' Setback' (*Medium*, 16 September 2020) <https://abarbararich.medium.com/a-backto60-setback-634311f526f7>.

[55] ibid.

[56] Patrick Dunleavy et al, 'Joining up citizen redress in UK central government' in Michael Adler, (ed) *Administrative Justice in Context* (Hart Publishing 2010); Gill and Creutzfeldt (n 4).

> [we] had to stick to 'the contract will, we think', and always putting in 'we think' or 'we're worried because' rather than saying 'it's going to do this' … it was about how to make sure the language, because [the other side] could just come back and say '999 said it will do this, it's clearly not going to do this' … what we always wanted to do was not give them any hooks to use against us (Campaigner 1, 999 Call).

Rather than connected to any of the case studies, then, my concern arises on a general basis. Several participating lawyers raised now-familiar concerns at the macro-level that, where crowdfunding appeals are framed as part of political campaigns to gain a competitive fundraising advantage, campaigners may act unethically in obscuring from donors the claim's legal basis or the riskiness of judicial review. Jolyon Maugham observed when interviewed: "it's not terribly difficult to raise an awful lot of money by massively overpromising and launching a rubbish claim … which has salience with a lot of people." Equally, though, it was emphasised that clients require professional privilege and ought not publish legal advice or disclose the precise legal risk their lawyers advise, not least because government lawyers will raise it in court. The matter of publishing pre-action correspondence was also raised, a practice the Good Law Project engages in routinely. Lawyers noted that it can be helpful ethically for a claimant, if possible, to publish their pre-action protocol letter on their crowdfunding page, transparently informing potential donors of the case's basis and, it was suggested, help the public to engage in the litigation, as they can follow its development in its linear stages. However, some lawyers raised an important procedural ambiguity regarding pre-action correspondence's status and confidentiality, noting that some public authorities can be resistant to their responses being made public, even if lacking especially confidential material. Resolving this procedural uncertainty, at least for cases where little requires confidentiality, would surely bring greater clarity, and perhaps contribute to generating transparency norms around crowdfunding.

The claimant-side transparency concern is most overtly exemplified by claims such as the Coronavirus Act or '50s women' pensions cases, where the campaigners actively mislead. There may, though, still be a public understanding issue where claimants have acted appropriately, by virtue of broader deficiencies in public understanding of judicial review and administrative justice, as Nason has noted.[57] When interviewed, a staff member at

[57] Sarah Nason, *Reconstructing Judicial Review* (Hart Publishing 2016), 127.

CrowdJustice expressed that public perceptions of administrative law have been limited and crowdfunding is raising its awareness:

> before crowdfunding for legal became popular in UK in the last few years, the public at large didn't really know how the law could be used to make change … I think words like judicial review, stuff like that, just isn't in the public consciousness, and I think more and more because of people like Good Law Project … taking these cases, it is (Staff 1, CrowdJustice).

This sense of a limited but growing awareness of judicial review resonates somewhat with the aforementioned critical comments of an Up the Elephant campaigner who suggested many who lack experience "put a lot of store" in legal responses to "political questions about power and control", lacking awareness of law's role in "maintaining the power of the political establishment" (Campaigner 2, Up the Elephant). This points towards a disconnect between, on one hand, the myth of public law 'accountability' among less experienced citizens not cognisant of judicial review's limitations – who may reify public law's potential to resolve social disputes – and, on the other, what judicial review, whose key designer and repeat player is the government, truly offers. While not captured empirically in the study, one need not look far online, especially on Twitter and for instance among supporters of the Good Law Project, to find a claim's supporters expressing lofty hopes at the prospect of bringing Ministers to account through judicial review, or disappointment in courts' failure to deliver a sufficiently powerful remedy where the organisation was successful. Remedial expectations can appear especially divorced from the realities of judicial review, sometimes aligning more with expectations of punishment in the criminal justice system. This risk is perhaps encouraged by the widespread perception of law as a hard-edged form of political accountability that underpins the allure of litigation, wherein a relatively neutral judiciary can hold political partisans liable for abuses of executive power. The communicative concerns associated with crowdfunding raise important regulatory questions, which the following concluding chapter engages with.

Conclusion

Case study participants' expressions of legal consciousness are, then, complex and multifaceted. In particular, those groups with more radical orientations to law articulate its limitations as a procedural establishment tool divorced from substantive questions of justice,

yet nonetheless litigate instrumentally amid a perceived lack of alternative avenues of political redress. All the while, a 'before the law' reification of law occasionally crept into participants' accounts. This discussion neatly encapsulates the outer limits of judicial review's utility as a tool of social reform, and the paradox of using law while conscious of its structurally embedded narrowness. Indeed, Jolyon Maugham wrestles with this throughout his book, articulating the role of judicial review in political accountability, while raising frustration at the degree of judicial deference to political elites and the enduring (and, Maugham argues, now-faulty) faith in a 'Good Chaps' theory of government.[58] These quandaries are certainly not confined to crowdfunded litigation. Crowdfunding does, though, invite 'ordinary' citizens to bring, donate to, and participate in polycentric litigation, creating space for frustrations to manifest with the limitations of both litigation and wider political systems. There was evidence in the case studies of carefully navigating communication with audiences. Yet there is a risk that citizens, encouraged by high-profile crowdfunding campaigns raising the otherwise deficient awareness of judicial review, might place too much faith in a distinctly legal flavour of political accountability. This represents, then, another dimension to the challenges of using crowdfunding to litigate – the importance of recognising courts' institutional limitations for effecting change, and of ensuring law's potential is therefore not overstated to those less closely associated with the claim.

[58] Jolyon Maugham KC, *Bringing Down Goliath: How Good Law Can Topple the Powerful* (WH Allen 2023).

Chapter Nine: Conclusions

Drawing the threads together

This thesis has substantially expanded the tale of crowdfunding in judicial review, providing much-needed empirical intervention into a field replete with heated commentary yet lacking rigorous study. It is hoped that the detailed quantitative and qualitative analysis here will make a rational and persuasive contribution to these growing debates, providing a sturdy base against which to assess assumptions as to crowdfunding's operation. This final chapter concludes the thesis not by recounting the previous eight chapters, but by summarising some of its key contributions.

The chapter first discusses some (primarily methodological) limitations of the thesis, caveating findings and the subsequent discussion of contributions to knowledge. It then categorises some core empirical findings from across the quantitative and qualitative research, before discussing the thesis' core theoretical contributions. Of course, splitting the empirical and theoretical is not straightforward – one of the strengths of the thesis, it is submitted, is that it both makes an important empirical contribution to an undernourished field, and develops original theoretical arguments using those data. Finally, it articulates a research agenda moving forward for crowdfunding in public law, and for costs, funding, and exclusions in judicial review more broadly, and briefly considers possible policy implications.

Limitations

Naturally, certain limitations, predominantly methodological in nature, caveat the research's representativeness to the field. First, the initial quantitative research is, by now, a couple of years old, with data collected up to November 2020. In one sense, this is relatively unproblematic. It takes time to collect data of this nature and 413 cases represent a sufficient dataset from which to draw generalisable conclusions regarding crowdfunded judicial reviews as a whole. This is because it represents almost every judicial review hosted on CrowdJustice.com until that time. Furthermore, one of the key functions of the quantitative research was to inform a case selection strategy based on the core variables dominating the crowdfunding dataset at the time of case selection – in that sense, it clearly serves its purpose. That said, a considerable amount of time has passed since November 2020. With crowdfunding a fast-moving phenomenon, certain newer trends in the caseload – perhaps shifts in the characteristics of claims advertised – may have been missed.

Turning to the qualitative case study research, it is trite to note that case studies are not generalisable to a wider population and are more suited to illustrative and exploratory findings. The interview sample here is, though, sufficiently robust in qualitative research terms, and, while the Reclaim These Streets case study involves only three participants, great care has accordingly been taken not to overstate those accounts. As Chapter Three discussed, Yin's approach that case study findings are generalisable to theory, capable of being tested in future research, remains persuasive.[1] Accordingly, efforts have been made here, albeit carefully managed and in the case studies' rich context, to suggest where points can be generalised to theory and may illustrate wider trends and practices. This includes where common threads cut across, and are corroborated by, accounts in several case studies, and where practitioners with broader experience of crowdfunding beyond the particular case have given indication of common practice – a somewhat unique feature of the 'elite' interviewee's capacity to inform research.

The other limitation involves not the utility of the data collected, but what data was ultimately not collected at all. The case studies were initially intended to incorporate a systematic document analysis, social media analysis, and questionnaires with donors to case study campaigns. While the case study analysis still has recourse to relevant documents, triangulation of sources has been more limited than initially envisaged. In truth, analysis of social media trends linked to cases, and a systematic document analysis, were less relevant to the research interests as they developed during the thesis. Meanwhile, crowdfunding donors represent a key collective actor whose voices remain obscured. It quickly became clear that donors would be difficult to access, yet these voices would have been very valuable indeed when discussing in Chapter Eight lay perceptions of the potential of crowdfunded litigation. These methodological features do narrow the thesis' claim-making capacity, but not overly significantly, particularly in view of the substantial contributions it has nonetheless produced.

Core empirical contributions

Through its mixed-methods approach, this study has produced empirical findings which are, at different points, generalisable (albeit less in-depth) and richly illustrative (but not statistically generalisable). Any attempt to briefly summarise will inevitably miss some of the nuance, yet

[1] Robert K Yin, *Case Study Research: Design and Methods* (4th edn, Sage 2009), 38.

some of the core novel observations can be grouped in three categories: the routinisation of crowdfunding; the plurality of resources; and the rigours of litigation.

The routinisation of crowdfunding

The thesis has, at various points, highlighted that much coverage of crowdfunding to date has focused on a small number of controversial high-profile claims – indeed, the very fact they are popular and provoke controversy is surely what has attracted commentators' attention. This has left us without a rigorous account of crowdfunding's operation in practice. The systematic quantitative analysis in Chapter Two enables a key argument, then, that this popular vision of crowdfunding, centred on well-funded claims, is incredibly partial. Even within collective public interest litigation, including by localised groups, crowdfunding often raises amounts radically smaller in scale than might be believed by much commentary, and the costs risk can still chill action. The quantitative analysis also indicates that grants of permission and overall success rates are sufficiently high to dispel concerns that crowdfunding is riddled with meritless claims.

Expanding on the quantitative findings in greater depth, the qualitative research added detail to the notion that crowdfunding's use is more routine than appreciated. Chapter Four indicated how, in the case studies and other cases within participants' experience, crowdfunding is an important feature of the judicial review funding landscape but often insufficient on its own. Rather, except where they act pro bono, it can help to fund claimant lawyers' fee arrangements, which may be discounted in some form, and crucially the funds (expected to be) raised contribute to an Aarhus costs limit or costs-capping order. This dynamic in particular appears increasingly routinised and well-understood by parties in public interest litigation. Crowdfunding, then, has a useful function as one part of a patchwork of funding mechanisms, amid an otherwise exclusionary costs system. In these ways, the thesis counters accounts of crowdfunding which raise alarm as to how it will fit into public law litigation – on a number of counts, crowdfunding appears to 'fit' reasonably smoothly.

The plurality of resources

Adopting the legal mobilisation framework, the qualitative case studies indicate crowdfunding may represent multiple forms of resource for an organisation. While its use is first and foremost a pragmatic choice, likely because alternative litigation financing is unavailable, crowdfunding may also have wider incidental value, when taking a broader understanding of 'resource' incorporating non-material organisational resources. In this regard, it argues that, in the case

studies, crowdfunding has provided social actors, especially those lacking experience communicating around litigation, the chance to utilise the interaction of litigation and associated publicity to increase pressure on public authorities and assist in developing a campaign beyond the legal claim itself. An organisation's use of crowdfunding may also influence the nature of its future campaign action, such as in generating cultural resources like confidence in communicating a litigation strategy to the public. As such, the nature of crowdfunding as something of a democratised litigation funding method – notwithstanding the caveats about such claims – can itself aid the accumulation of wider resources, alongside crowdfunding's primary material role in covering costs and mitigating the costs risk.

The rigours of litigation

Part Three of the thesis represented a shift in focus towards the difficulties of crowdfunding for litigation. A key empirical observation here, seldom discussed in debates around crowdfunding, is the resource burden associated with bringing crowdfunded litigation. This includes emotional burdens imposed by litigating, due to the costs risk, adversarial defence tactics, and volumes of documentation, as well as discrete challenges presented by crowdfunding itself. Crowdfunding can be a draining resource sink for an organisation, while the burden of advertising a page will not necessarily be worthwhile given inequalities in public preferences appear to restrict certain causes' funding prospects. Crucially, the dynamic of 'marketing' a justiciable cause, experienced as uncomfortable and alien to individuals, appeared to increase the emotional burden.

These observations highlight the challenges facing actors mobilising law in the case studies, noted to be particularly acute considering the divergent temporal structures of the judicial review system, social campaigning, and the crowdfunding process. While presenting opportunities for publicity, judicial review's linear structure was argued to exert an ordering effect restricting claimants' legal mobilisation processes. This arguably represents part of the wider reality that, for some crowdfunded litigants, judicial review may resemble a limited establishment tool which does not go as far as they would like. As such, public law's architecture arguably reflects the relative power of different litigation actors and their capacities to influence system design, delimiting the scope of acceptable mobilisation.

Core theoretical contributions

As indicated in Chapter One, and illustrated throughout, this project speaks to and across multiple audiences. It should be expected, then, that it makes an original and valuable contribution to a number of scholarly communities. Accordingly, several key theoretical findings cut across literatures.

Conceptualising 'public interest litigation'

It is trite to note the nebulous nature of 'public interest litigation' and its neighbours – test case strategies, strategic litigation, and so on. It is more useful to offer a way to understand and operationalise the concept notwithstanding this indeterminacy. The thesis articulates a different way of understanding collective litigation efforts which responds to a reservation I have with existing accounts – the neglect of claims which do not raise novel legal questions or reconsider legal approaches as such,[2] but nonetheless seek social goals extending beyond the immediate claim. Based inductively on quantitative findings from Chapter Two, the thesis expands the gaze of accounts of public interest litigation to focus on groups with less ongoing litigation experience and which are more localised. These groups might often align with scholars' intuitive view of public interest litigation,[3] but do not seem to resonate naturally with the definitions offered to date.

Through its inductive typology for understanding collective uses of litigation, and through sampling and studying inexperienced and local litigants in the qualitative case studies, this project demonstrates the value of acknowledging a broader picture of 'public interest' litigant. If this profile of litigant is different than scholars have previously appreciated, this indicates a need to pay close attention to what is happening in practice and who is doing it, including in venues below apex courts. Accordingly, the thesis sounds a call to arms for scholars of public interest litigation and legal mobilisation to integrate and study more systematically the use of law by less organised or nationally-focused actors.

[2] For such an approach, see Michael Ramsden and Kris Gledhill, 'Defining strategic litigation' (2019) 38(4) CJQ 407.

[3] See for instance Tom Mullen, 'Protective Expenses Orders and Public Interest Litigation' (2015) 19(1) Edin.L.R. 36, 37.

Articulating resource

As indicated above, the thesis articulates crowdfunding's potentially multifaceted resource functions within the matrix of resources considered useful for legal mobilisation. Crowdfunding is a core and growing feature of modern legal mobilisation in the UK, and is worth understanding in the wider theoretical framework of resource mobilisation and legal opportunity. Alongside its primary material function, the thesis draws attention to how the very means of mobilising law through crowdfunding can bring non-material benefits related to, and discrete from, the use of law itself. Perhaps for activist communities bringing crowdfunded litigation, it may be fruitful to acknowledge and build these facets more systematically into legal strategy.

Yet the thesis also emphasises resource intensity: both the potential opportunity cost of investing resource in litigation instead of other strategies – issues acknowledged by (particularly American) legal mobilisation scholars –[4] and the potential stress litigation can cause individual litigants – which has tended to receive less focus. This is an important perspective on the limitations of litigating for social change, focusing on the litigation process' potentially negative effects internal to the organisation and its personnel, rather than from the top-down and focused on judicial institutions.[5] Legal mobilisation literature underemphasises how mobilisation affects individuals, with its expensive and risky litigation and adversarial interactions. Perhaps this is viewed more as the reserve of access to justice or legal consciousness scholarship. Yet if, as this thesis urges, we are to pay attention to mobilisation efforts by less experienced actors, this key effect will need to be accounted for. The recent focus of Vanhala and Kinghan on the rigours of mobilising litigation for marginalised claimants is welcome,[6] and capturing this dynamic more systematically across a range of contexts should be a future growth area in the field.

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[4] Stuart A Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (2nd edn, University of Michigan Press 2004), 49-52; Michael W McCann and Helena Silverstein, 'Rethinking Law's Allurements: A Relational Analysis of Social Movement Lawyers in the United States' in Austin Sarat and Stuart Scheingold (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities* (OUP 1998), 263; Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (University of Chicago Press 1991).

[5] Douglas NeJaime, 'Winning through Losing' (2011) 96(3) Iowa L.Rev. 941, 954-955; Catherine Albiston, 'The Dark Side of Litigation as a Social Movement Strategy' (2011) 96 Iowa L.Rev. Bull. 61, 62-65.

[6] Lisa Vanhala and Jacqueline Kinghan, 'The 'madness' of accessing justice: legal mobilisation, welfare benefits and empowerment' (2022) 44(1) JSWFL 22.

A procedural perspective on judicial power

In drawing attention to the financial attritions on court access for social ends, as well as the resource intensity and burden facing litigants, the different temporalities of public law and campaigning, and the limits of law to fulfil some campaigners' ends, the thesis also arguably contributes to judicial power debates in a distinctly procedural way. Participants indicated how very difficult indeed it is to bring a judicial review claim and navigate the costs risk, adversarialism, and stress. The discussion of judicial review's distinct temporal cadence, compared to campaigning and crowdfunding, highlights that the process may constrain and order claimants' actions, exemplifying the power imbalance which claimants face vis-à-vis the executive, as repeat player defendant and system designer, and judiciary. Discussion of judicial power often, understandably, focuses on legal doctrine, particularly apex court decisions.[7] The picture painted by the procedural difficulties experienced in these case studies, though, is far from that of an overreaching judiciary – rather, judicial procedure shapes and limits claimants' mobilisation processes. These observations offer an alternative and valuable way to approach judicial power, recognising the experiences of organisations and individuals struggling against numerous forms of attrition resulting, to varying extents, from institutional design. In particular, the discussion of judicial review temporality's is an under-theorised dynamic, and promises to be a valuable route of scholarly interrogation.

Expanding the imaginative study of judicial review

Alongside the theoretical contributions resulting from discrete parts of the thesis, it is submitted that the very research design itself contributes theoretically to the study of public law. As outlined in Chapter One, UK public law scholarship is experiencing something of an empirical and systematic challenge from a small subset of its research community. They call for scholars to be more curious in studying judicial review, reflecting on the issues they are attentive to,[8] and the methods employed to understand practice,[9] broadening the field's collective legal

[7] Paul Craig, 'Judicial review, methodology and reform' [2022] PL 19.

[8] Joanna Bell, 'Significant Academic Articles in 2020: Five Contributions to Understanding and the Growing Plea for More Imaginative Study of Judicial Review' (2021) 26(1) JR 68, 79-81; Joanna Bell, 'Rethinking the Story of *Cart v Upper Tribunal* and Its Implications for Administrative Law (2019) 33(1) OJLS 74; Joanna Bell and Elizabeth Fisher, 'Exploring a year of administrative law adjudication in the Administrative Court' [2021] PL 505.

[9] See these chapters in Carol Harlow (ed), *A Research Agenda for Administrative Law* (Edward Elgar 2023): Elizabeth Fisher, 'Imagining method in administrative law scholarship'; Sarah Nason and Joanna Bell, 'Judicial review scholarship expanding legal scholarly imagination'.

imagination.[10] This study, while primarily framed in the legal mobilisation literature, contributes valuably to this challenge. It interrogates the received wisdom of crowdfunding's entry into public law – its distinctly disruptive nature ill-suited to judicial review litigation – and, through mixed-methods empirical work, paints a radically different picture when exploring the activity occurring beneath the surface of its most high-profile cases. It is, then, yet another indication of the value, for informing scholarly and policy audiences, in putting right the long-running absence of 'a sophisticated and empirically accurate account' of contemporary and underexplored features of judicial review.[11]

Moving forward, what next?

A research agenda on crowdfunding and public law's exclusions

This thesis represents the most substantial engagement with crowdfunding in judicial review to date. Though it has interrogated a number of core research interests, much remains to be done in this field. As indicated, donors remain a key under-accessed perspective – donating to crowdfunding represents a relatively novel way to engage in public law litigation, with a wide catchment of laypeople participating more actively than, for instance, simply following cases in the news. Their experiences and perceptions of crowdfunding are important – particularly if we are to either substantiate or downplay concerns about laypeople experiencing disillusionment with justice. Surveys and interviews, perhaps alongside social media analysis, would help to access their worldviews. As Chapter Eight indicates, a legal consciousness

[10] Elizabeth Fisher, 'Administrative Tribunals: An Essay about the Legal Imagination of Administrative Law Scholars' in James Goudkamp, Mark Lunney and Leighton McDonald (eds), *Taking Law Seriously: Essays in Honour of Peter Cane* (Hart Publishing 2021). Fisher has discussed 'legal imagination' widely: Elizabeth Fisher, 'Climate Change and Statutory Construction: Administrative Law Expertise and "New" Emergencies' (2023) 27(3) Edin.L.R. 322; Elizabeth Fisher, *Environmental Law: A Very Short Introduction* (OUP 2017), ch 5; Elizabeth Fisher, 'Legal Imagination and Teaching' in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (2nd edn, OUP 2021); Elizabeth Fisher and Sidney A Shapiro, *Administrative Competence: Reimagining Administrative Law* (CUP 2020), ch 1.

[11] To paraphrase Joe Tomlinson, Katy Sheridan and Adam Harkens, 'Judicial Review Evidence in the Era of the Digital State' [2020] PL 740, 746.

framework would likely be illustrative, resonating especially with Gill and Creutzfeldt's account of 'ombuds watchers'.[12]

Alongside broadening which actors we pay empirical attention toward, we might also widen the sectoral gaze, discerning how crowdfunding works beyond judicial review, in procedural contexts with other costs and funding implications. CrowdJustice is replete, for instance, with appeals to support parties appearing at employment tribunals, including several controversial cases related to gender identity brought by 'gender critical' claimants including Maya Forstater,[13] Dr Laura Favaro,[14] and Allison Bailey.[15] Even considering forms of decision-making falling squarely within administrative law, CrowdJustice appeals abound to fund the fees of parties to statutory appeals and inquiries in the planning system. Such a focus would also mirror calls, discussed in Chapter One, to expand the horizons of public law scholarship to forms of administrative adjudication beyond judicial review.[16]

A core theoretical observation of the thesis was the suggestion that crowdfunding, alongside its primary material role, offers to social actors (particularly those who are less experienced or more localised) the possibility of accumulating non-material resource benefits. I would be keen to see this observation tested beyond the crowdfunding sphere. Legal mobilisation scholars might question whether recourse to other funding mechanisms – perhaps legal aid, institutional grant funding, or other third-party funding models – potentially facilitates other, different, non-material resource benefits.

Similarly, it is high time for a dedicated empirical study of judicial review costs and funding, shedding further light on the 'secret history' of judicial review's practical exclusions

[12] Chris Gill and Naomi Creutzfeldt, The 'Ombuds Watchers': Collective Dissent and Legal Protest Among Users of Public Services Ombuds (2018) 27(3) S.& L.S. 367.

[13] Maya Forstater, 'I lost my job for talking about women's rights' (CrowdJustice, 2019) <https://www.crowdjustice.com/case/lost-job-speaking-out/>; Maya Forstater, 'Stand With Maya!' (CrowdJustice, 2021) <https://www.crowdjustice.com/case/stand-with-maya/>. All webpages in this chapter last accessed 11 September 2023 unless otherwise stated.

[14] Dr Laura Favaro, 'Academic freedom for feminists' (CrowdJustice, 2023) <https://www.crowdjustice.com/case/academicfreedomforfeminists/>.

[15] 'Statement from CrowdJustice' (CrowdJustice, 2020) <https://www.crowdjustice.com/case/allison-baileys-case/>.

[16] Genevra Richardson and Hazel Genn, 'Tribunals in transition: resolution or adjudication?' [2007] PL 116, 118-119; Fisher (n 10), 280.

from access.[17] The mixed-methods approach employed in this thesis – a systematic overview of the field followed by qualitative interviews – is a helpful model, as is the style of case law content analysis seen in recent empirical scholarship.[18] A mixture of systematic research and qualitative methods could usefully shed light on judicial approaches to costs and funding, such as the operation of the Aarhus costs model and the wisdom of its extension to non-environmental claims.[19] Costs is one feature of judicial review too often seen as 'the stuff of practice' rather than academic enquiry,[20] perhaps partly (and fairly) because much of what happens with costs occurs pre-action, less easy of access than published final judgments, and research would thus require practitioner input. Indeed, the Independent Review of Administrative Law, hamstrung by a limited research corpus, explicitly concluded that:

> the potentially serious impact of the current costs regime in judicial review cases on access to justice, and the concern of defendants as to the impact of that regime on their functioning – and what might be done about that impact – needs further careful study by a body equipped to carry out the kind of research and evaluation that we have not been able to apply…[21]

Empirical mixed-methods analysis of costs, alongside other procedural features,[22] such as time limits, can help build a sorely-needed rigorous picture of exclusions and access to justice in judicial review.

Finally, it would be remiss, when discussing the trajectory of both crowdfunding research and empirical study in judicial review more widely, not to mention the need for better data access. On crowdfunding, CrowdJustice routinely collects, internally, significant volumes of data related to the cases hosted on its site. The organisation appears to have very

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[17] Richard Rawlings, 'Modelling Judicial Review' (2008) 61(1) CLP 95, 109; Joe Tomlinson, 'Foundations for a 'secret history' of judicial review: a study of exclusion as bureaucratic routine' (2019) 41(2) JSWFL 252.

[18] Richard Kirkham and Elizabeth A O'Loughlin, 'A content analysis of judicial decision-making' in Naomi Creutzfeldt, Marc Mason and Kirsten McConnachie, *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge 2020).

[19] As proposed in Lord Jackson's supplemental report on costs: Lord Justice Jackson, *Review of Civil Litigation Costs: Supplemental Report – Fixed Recoverable Costs* (TSO 2017).

[20] Joanna Bell, 'Remedies in judicial review: confronting an intellectual blindspot' [2022] PL 200, 200.

[21] Ministry of Justice, *The Independent Review of Administrative Law* (Cm 407, 2021), 4.14.

[22] Valuable mixed-methods empirical work is developing on the duty of candour: *Transparency and judicial review: a study of the duty of candour* (Nuffield Foundation, 2022) <https://www.nuffieldfoundation.org/project/transparency-and-judicial-review-a-study-of-the-duty-of-candour>.

sophisticated internal data collection processes, and retains much valuable information on the nature of litigation. By contrast, the statistics that it has shared externally are incredibly limited. While a private organisation with no obligation to publish this data, CrowdJustice is emerging as a key actor in the modern landscape of public law and public interest litigation, with a wealth of knowledge regarding a highly contested feature of litigation which speaks to litigation's proper place in resolving policy disputes. If, as it appears, CrowdJustice does hold valuable and unique information on an important and controversial dynamic of litigation, it might help to release these data more widely, in some form, to facilitate analysis of patterns. That a private company does hold such data, which might provide useful insight on the operation of public law, should give rise to some concern. More generally, access to data on judicial review has proven problematic. For instance, only 55% of full judicial review judgments are available on freely accessible platforms such as BAILII – the rest are held behind commercial providers' paywalls.[23] Across both contexts, then, reduced public access obfuscates important information on, and scope for scrutiny of, public law litigation. Such fragmented access to knowledge, with much held behind closed-doors, is ill-placed to contribute to robust understanding of empirical reality, nor evidence-based approaches to policy. Recent judicial practice from, in particular, Fordham J has demonstrated the value, in terms of transparency and insight into decision-making, of publishing early-stage Administrative Court decisions in the judicial review process – notably, in the context of minded to transfer orders (decisions on the appropriate regional venue for a claim to be heard).[24] Much progress is still to be made, though, and the research community (among other actors) would certainly benefit from a more systematised approach towards publishing data, ensuring future scholarship is built on strong evidence and broadening the potential research questions capable of being addressed.

Policy responses

At last, we turn to the elephant in the room – what do the thesis' findings say for the future of regulating crowdfunding? The appropriate approach (if any) to regulating crowdfunding has not been a direct focus here, however the new empirical insights do have important implications for the regulatory discussion. The findings indicate that crowdfunding is now here to stay as a routine part of the 'public interest' judicial review landscape – indeed, the interviews indicate

[23] Daniel Hoadley et al, 'How Public is Public Law? The Current State of Open Access to Administrative Court Judgments' (2022) 27(2) JR 95.

[24] Lee Marsons and Gabriel Tan, 'Levelling Up Judicial Review: Regionalising the Administrative Court in England' (2022) 27(4) JR 281.

government lawyers accept that this is so. This appears worth acknowledging at an early stage when considering reform, potentially helping frame the regulatory issue in line with the state of the landscape in practice. The thesis has also demonstrated both the importance of crowdfunding for access to justice, and the precarity experienced by vast numbers of claimants even when using crowdfunding. This may support the view that any regulatory response ought to be relatively light-touch, and that great care should be taken to ensure prospective claimants do not incur any unintended consequences, and avoid 'plac[ing] a straightjacket on litigation strategy'.[25]

Beyond these guiding principles – encouraging regulatory actors to frame the scale of the problem in view of crowdfunding's importance and the wider justice funding crisis – the thesis' findings perhaps speak less directly to the substantive details of regulation. Substantively, a core feature of commentators' early discussion of regulation has been ensuring crowdfunding appeals are run transparently, and donors have sufficient information to make properly informed donations.[26] The thesis discussed this issue in Chapter Eight, and it appears an appropriate matter towards which to focus some regulatory attention. Furthermore, the findings in Chapter Two highlighting the degree to which updates on crowdfunding pages are neglected suggest that the matter of updating donors once a claim is underway also warrants consideration. Regarding transparency considerations in fundraising appeals, discussion of temporalities in Chapter Seven may prove informative, and the degree to which requiring transparency is feasible. As fundraising often begins early in proceedings, when specific public law arguments may not yet have been crystallised but funding is needed to engage lawyers for initial advice, this may influence whether an indication on a crowdfunding page of, say, grounds of review, is feasible. This perhaps represents another instance of the temporal differences between the judicial review timeline, and claimants' bottom-up attempts to access law via crowdfunding. Depending on the precise detail of a requirement for transparency, it could possibly further encumber claimants with an onerous duty at an early stage. This might particularly apply to those incapable of self-funding initial advice, likely smaller-scale claimants. There is also a risk, depending on the degree of disclosure expected, of giving defendants an unintended upper hand. Though the thesis has not dedicated attention to

[25] Joe Tomlinson, 'Crowdfunding public interest judicial reviews: a risky new resource and the case for a practical ethics' [2019] PL 166, 184. Tomlinson suggests a focus on ethical baseline principles aimed at lawyers.

[26] The Law Drafter, 'WHITE PAPER: Regulation of Crowdfunding' (12 December 2022) <https://thelawdrafter.substack.com/p/white-paper-regulation-of-crowdfunding>.

regulatory approaches, one potential way to help address transparency concerns while acknowledging the above concerns might be to encourage the provision of, at the very least, relatively standardised information which a claimant's lawyers could assist with. This could explain, for instance, the nature of the relevant litigation process, the remedies that could feasibly be sought, and how donations will be used.

Chapter Eight raises a seemingly small yet important feature of the regulatory issue, raised less commonly by commentators to date: the capacity to publish pre-action correspondence. Publishing this might aid transparency and facilitate public engagement, but some participants reported experiences of public authorities resisting disclosure of even responses which lacked confidential information. As such, clarity as to the status of pre-action confidentiality would be useful and might further facilitate greater transparency in the early stages of litigation.

In any event, these efforts to regulate crowdfunding should be of secondary importance when considering access to justice policy. A core theme throughout the thesis has been the precarity which crowdfunded claimants still experience, and the forces of attrition working against them – with the costs risk especially chilling. In this way, the thesis urges those interested in judicial review to take exclusion from litigation more seriously. Regulation of crowdfunding is an important issue deserving serious consideration, and should make a (hopefully positive) difference in this space. Yet the scale of the issue in relation to the wider health of the judicial review costs landscape should not be overstated: for a law and policy commentariat concerned genuinely with realising access to justice, there are, to be frank, bigger fish to fry than regulating crowdfunding. These include initiatives such as the problematic expansion of Fixed Recoverable Costs in immigration judicial review claims,[27] though this appears to have been paused following a change of government, as well as more longstanding concerns such as the viability of Qualified One-way Costs Shifting in judicial review, or reversing the detrimental impact on access of cuts to legal aid. We should view the lively debate around crowdfunding against these structural concerns affecting vast numbers of users of the judicial review process, and the chilling effect of the costs risk still experienced by crowdfunded claimants. Vast swathes of the population remain effectively excluded from judicial review – crowdfunding does not resolve this puzzle, and is but one feature in a

[27] Robert Thomas and Joe Tomlinson, 'Certainty at all Costs? A Critical Analysis of the Proposed Introduction of Fixed Recoverable Costs in Immigration Judicial Reviews' (2021) 26(4) JR 255.

patchwork of mechanisms facilitating improved access. More so than crowdfunding itself, it is the reality of public law's exclusions – which has given rise to the use of crowdfunding in the first place – that ought to incite our most ardent reformist focus and passion.

Appendix A

Sample Interview Guide for Campaigners (Generic)

Before JR

1. Can you first talk me through quite generally your role in the group?
2. Can you talk me through the policy issue and how you first became aware of it?
   What steps did you take initially to look into and challenge the policy?
3. What made you explore if it was a potential JR issue?
   How familiar were you with judicial review before this case?
4. How did you find the process of developing the legal case?
5. How did you become aware of crowdfunding and decide to use it to fund the JR? Were other sources of funding considered?
6. I understand your costs were capped. What were your perceptions of the costs-capping process?
   How do you see the relationship between crowdfunding and costs-capping?
   Can crowdfunding affect the terms of the cap, or the approach of different parties to the process?

Experience of crowdfunding and JR

7. How did you find the crowdfunding experience?
8. Were you involved in constructing the CrowdJustice page?
   How did you find that process?
   What decisions were made around what information to include/exclude, and how to present it?
9. Did you raise the amount of money you hoped for in the crowdfunding pages?
10. How connected did you feel to the crowdfunding donors?
    Do you have a sense of whether donors have remained interested in the campaign or the work of the group more broadly?
11. What role did traditional and social media play in the campaign?
    Did the media strategy interact with the crowdfunding campaign?
    Did the campaign have much public traction? Why do you think this?
12. Do you have any other comments or observations on crowdfunding? Did you learn anything about crowdfunding while using it?

13. How did you find the JR process overall? What were your views on the experience at each stage?
14. How was the interaction between the parties in the process?

After JR

15. Have there been, in your view, any effects from the litigation so far, positive or negative, direct or indirect?
16. Are there any other campaign efforts that have been undertaken in this space since or alongside the JR?

General Questions

17. Turning to crowdfunding more generally, what have been your experiences of other crowdfunded cases? [*Question for repeat player crowdfunding users*]
18. What are your views more generally on crowdfunding as a resource for covering JR costs?
    - What do you see as its main benefits?
    - Do you see there being any risks or problems?
    - How does it fit with the rest of the costs and funding landscape in your view?
19. Do you have any views on the CrowdJustice website itself?
    - Is it effective?
    - Does it have any limitations?
20. Do you have any final things you'd like to raise that might be relevant? Any general views on crowdfunding or any of the issues we have discussed?
21. Do you have any questions for me?
22. Is there anybody else you feel would be good to speak to about this?

Appendix B

Informed Consent Form for Participants

PhD Research Project on Crowdfunding in Judicial Review Cases

This form is for you to state whether or not you agree to take part in the research. Please read and answer every question. If there is anything you do not understand, or if you want more information, please ask the researcher.

Have you read the participant information leaflet about the research project?	Yes ☐ No ☐
Do you understand what this project is about and what participating involves?	Yes ☐ No ☐
Have you had an opportunity to ask questions about the research?	Yes ☐ No ☐
Have you had your questions answered satisfactorily?	Yes ☐ No ☐
Do you understand that the information you provide will be held in confidence by the researcher?	Yes ☐ No ☐
Upon completion of projects, it is common for researchers to archive the data collected in a University database, allowing other genuine researchers to access it, only upon request. This process is handled carefully and securely. Do you consent to your interview data being archived upon the end of the project?	Yes ☐ No ☐
Do you agree to the use of quotations that arise from your interview in the presentation of the research?	Yes ☐ No ☐
Do you understand that the information and quotations you provide may be used in future research outputs, such as academic journal articles or a book?	Yes ☐ No ☐
Your personal anonymity is provided by default, unless you wish to be identified in the research. Do you wish to waive anonymity and be identified in the research?	Yes ☐ No ☐

[*If you ticked No to waiving anonymity*]

Do you understand that, even if you are not individually named, your role in the case will be named, so it may be possible for some people to identify and attribute comments to you?	Yes ☐ No ☐
Do you understand that if you decide to participate and later decide you would like to leave the project, you are free to withdraw up to three months after your interview without providing a reason?	Yes ☐ No ☐
Do you agree to take part in the research project?	Yes ☐ No ☐
If yes, do you agree to your interviews being recorded? (You may take part in the study without agreeing to this).	Yes ☐ No ☐

Please sign your name here:

Please write your name (in BLOCK letters) here:

Date:

All data is held securely and in accordance with the Data Protection Act and any subsequent legislation.

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Abbreviations

999 Call – 999 Call for the NHS

CARA – Croyde Area Residents Association

EU – European Union

GLP – Good Law Project

HRA – Human Rights Act

JCWI – Joint Council for the Welfare of Immigrants

JR – judicial review

ORG – Open Rights Group

TCPA 1990 – Town and Country Planning Act 1990

UNECE – United Nations Economic Commission for Europe

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